(1)

SUPREME COURT, U.S.
FILED

No. 04-041456 FEB 27 2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

LUIS SPENCER,
Petitioner,

v.

ROGER NORTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

THOMAS F. REILLY
Attorney General of Massachusetts

CATHRYN A. NEAVES*
Assistant Attorney General

DEAN A. MAZZONE
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

**Counsel of Record*

QUESTIONS PRESENTED

1. Did the First Circuit err in holding that, when a state court summarily denies a habeas petitioner's motion for a new trial, which includes a *Brady v. Maryland* claim premised on affidavits, the state court should be deemed not to have ruled on the credibility of the affidavits?

2. Did the First Circuit err in holding that habeas relief can be granted on the basis of a *Brady v. Maryland* claim premised on affidavits when the state court of appeals has held that the affidavits would, under state law, have been inadmissible at trial in state court?

PARTIES TO THE PROCEEDINGS

All parties to this case are named in the caption. No party to this petition is a non-government corporation requiring a statement as to publicly held ownership interests pursuant to Rule 29.6 of the Rules of this Court.

TABLE OF CONTENTS

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDINGS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTION 2

CONSTITUTIONAL PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

1. *Procedural History* 3

2. *The First Circuit's Decision* 6

REASONS FOR GRANTING THE WRIT 7

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *MARSHALL V. LONBERGER* AND *LAVALEE V. DELLEROSE* 7

II. THE FIRST CIRCUIT'S HOLDING THAT THE INFORMATION IN THE AFFIDAVITS WAS ADMISSIBLE AT TRIAL IN STATE COURT CONFLICTS WITH THE STATE COURT'S HOLDING THAT THE INFORMATION IN THE AFFIDAVITS WAS NOT ADMISSIBLE AT TRIAL IN STATE COURT. 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES

Brady v. *Maryland*, ... *Passim*
373 U.S. 83 (1963)

Breedlove v. Moore, ... 14
279 F.3d 952 (CA11 2002)

Commonwealth v. Chin Kee, ... 10n
283 Mass. 248,
186 N.E. 253 (1933)

Commonwealth v. Coggins, ... 10n
324 Mass. 552,
87 N.E.2d 200 (1949)

Commonwealth v. Cook, ... 11n
438 Mass. 766,
784 N.E.2d 608 (2003)

Commonwealth v. DeChristoforo, ... .11n,13n
360 Mass. 531,
277 N.E.2d 100 (1971)

Commonwealth v. Doyle, ... 10n
323 Mass. 633,
84 N.E.2d 20 (1949)

Commonwealth v. Heffernan, ... 10n
350 Mass. 48,
213 N.E.2d 399 (1966)

Commonwealth v. Millen, ... 10n
290 Mass. 406,
195 N.E. 541 (1935)

Commonwealth v. Norton, ... 3
38 Mass. App. Ct. 1121,
664 N.E.2d 883 (1996)

Commonwealth v. Norton, ... 4
49 Mass. App. Ct. 1110,
728 N.E.2d 972 (2000)

Commonwealth v. Norton, ... 3
423 Mass. 1103,
667 N.E.2d 1159 (1996)

Commonwealth v. Norton, ... 4
432 Mass. 1110,
738 N.E.2d 354 (2000)

Commonwealth v. Sacco, ... 10n
255 Mass. 369,
151 N.E. 839 (1926)

Estelle v. McGuire, ...14
502 U.S. 62 (1991)

Hennon v. Cooper, ... 11, 13n
109 F.3d 330 (CA7),
cert. denied, 522 U.S. 819 (1997)

LaVallee v. Delle Rose, ... 7
410 U.S. 690 (1973)

Marshall v. Lonberger, ... 7
459 U.S. 422 (1982)

Norton v. Spencer, ... 1, 5, 8n, 13
351 F.3d 1 (CA1 2003)

Parker v. Head, ... 12
244 F.3d 831 (CA 11 2001)

Puleio v. Vose, ... 15n
830 F.2d 1197 (CA1 1987)

Rashad v. Walsh, ... 11, 13n
300 F.3d 27 (CA1 2002)

Sanna v. DiPaolo, ... 8
265 F.3d 1 (CA1 2001)

Sumnner v. Mata, ... 10
449 U.S. 539 (1980)

United States ex rel Jones v. DeRobertis, ... 8, 9n
766 F.2d 270 (CA7),
cert denied, 475 U.S. 1053 (1986)

United States v. McGill, ... 12n
11 F.3d 223 (CA1 1993)

STATUTES

28 U.S.C. § 2254 ..... 2, 4, 8, 12

RULES

United States Supreme Court Rule 12 1

United States Supreme Court Rule 13 ..... **1**

United States Supreme Court Rule 14 ..... **1**

United States Supreme Court Rule 29.6 ..... **ii**

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

LUIS SPENCER
Petitioner,

v.

ROGER NORTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Pursuant to United States Supreme Court Rules 12, 13, and 14, the petitioner, Luis Spencer, as he is the Superintendent of the Massachusetts Correctional Institution at Norfolk, hereby petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit entered in this case on December 2, 2003.

OPINIONS BELOW

The opinion of the Court of Appeals reversing the respondent, Roger Norton's ("Norton") convictions for indecent assault and battery of a minor, is reported as *Norton v. Spencer*, 351 F.3d 1 (CA1 2003), and is reproduced in the Appendix at App. 1-13. The opinion of the Massachusetts Appeals Court affirming the denial of the motion for new trial is unpublished, and is reproduced in the Appendix at App. 14-23. The unpublished opinion of the Massachusetts Superior court denying

the motion for new trial is reproduced in the Appendix at App. 23-24.

JURISDICTION

The judgment of the Court of Appeals entered on October 30, 2003. App. 1. The respondent timely filed a petition for rehearing and suggestion of hearing en banc, which was denied on December 2, 2003. The issue presented in this case is one of federal law and was resolved as such by the circuit court of appeals. This Court has jurisdiction to review the judgment by petition for writ of certiorari pursuant to 28 U.S.C. § 2254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the United States Constitution, made binding on the states through the Fourteenth Amendment, guarantee all citizens a fair trial, and ensure that criminal defendants have the right to receive exculpatory impeachment material from prosecutors. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

STATEMENT OF THE CASE

1. *Procedural History*

On September 14, 1989, a Hampden County, Massachusetts, grand jury indicted Norton on four counts of indecent assault and battery of a child under the age of fourteen. After the indictment was returned, the Commonwealth was unable to locate Norton until his arrest on the indictment in the state of Arizona several years later. On August 13, 1992, the petitioner's indictment came for trial before Massachusetts Superior Court judge William H. Welch and a jury. On August 14, 1992, the petitioner was convicted on three of the four counts, and on September 15, 1992, the petitioner was sentenced to approximately sixteen years in state prison. App. 2-4.

On May 14, 1996, the Massachusetts Appeals Court affirmed the petitioner's convictions in an unpublished Memorandum and Order pursuant to Massachusetts Appeals Court Rule 1:28, as amended, 10 Mass. App. Ct. 942 (1980), in *Commonwealth v. Norton*, 38 Mass. App. Ct. 1121, 664 N.E.2d 883 (1996). On July 9, 1996, the Massachusetts Supreme Judicial Court ("SJC") denied the petitioner's application for leave to obtain further appellate review ("ALOFAR") in *Commonwealth v. Norton*, 423 Mass. 1103, 667 N.E.2d 1159 (1996). App. 2-4.

On July 9, 1997, the petitioner filed a motion for new trial, alleging, among numerous other claims, that the Commonwealth withheld exculpatory evidence. Specifically, Norton submitted for the court's inspection various affidavits alleging, *inter alia*, that the victim's cousin, Noel Rodriguez, who had himself accused Norton of molesting him, and Noel's mother, Sonia Rodriguez, had told the prosecutor prior to trial that (1) Noel had fabricated his own allegations against Norton at the insistence of the then-eleven year old victim, (2) Norton had actually done nothing to Noel, and, (3) the victim had told Noel

that he, the victim, had fabricated his own allegations as well. App. 2-4.

On January 12, 1998, the motion for new trial was denied by the judge who presided over Norton's trial. On May 31, 2000, the Massachusetts Appeals Court affirmed the denial of the new trial motion in an unpublished Memorandum and Order in *Commonwealth v. Norton*, 49 Mass. App. Ct. 1110, 728 N.E.2d 972 (2000). On November 1, 2000, the SJC denied Norton's ALOFAR in *Commonwealth v. Norton*, 432 Mass. 1110, 738 N.E.2d 354 (2000). App. 2-4.

On April 30, 2001, Norton filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Spencer moved to dismiss the petition as time-barred and the district court agreed in part and dismissed the bulk of the petition. The district court, however, further held that the counts alleging violations of the rule in *Brady v. Maryland,* 373 U.S. 83 (1963), may survive the period of limitation "if the allegedly 'new evidence' could not have been 'discovered through the exercise of due diligence' prior to approximately January 5, 1997." See *Norton v. Spencer*, USDC No. 01-30070. Those counts concerned allegations by the petitioner, supported by affidavits, that before trial the prosecution had been informed by Noel Rodriguez and his mother, Sonia Rodriguez, that the victim told them that he (the victim) had fabricated the allegations in the criminal case. App. 2-4.

On March 25, 2003, the district court determined that the writ should be granted based solely on the petitioner's *Brady* claim. The district court, however, went on to hold that:

> Based on the foregoing, [Norton] is entitled, at a minimum, to a hearing at which the court can make findings of fact regarding his allegations that the prosecutor failed to provide exculpatory evidence. Given that the Noel and [Sonia] Rodriguez affidavits are so far entirely

> unrebutted, the court will issue the petition without an evidentiary hearing, unless [Spencer] requests one. Counsel for [Spencer] declined to take a position on this point at oral argument.
>
> Unless [Spencer] requests an evidentiary hearing by April 11, 2003, the court will allow the petition. The court at that time will order petitioner released unless, on or before July 11, 2003, the respondent has instituted proceedings to retry the petitioner. Pending such further proceedings, the petitioner shall not be enlarged on bail, unless ordered released by some court having competent jurisdiction.

On April 8, 2003, Spencer moved the district court to reconsider that portion of its order requiring the respondent to elect whether to request an evidentiary hearing. On April 16, 2003, the district court denied the motion to reconsider, and ordered that the writ be granted. See *Norton v. Spencer*, USDC No. 01-30070.

Spencer moved the district court to stay the issuance of the writ, but the court denied the motion. Spencer appealed the district court's order granting the writ, and the appeal was docketed in the United States Court of Appeals for the First Circuit on May 1, 2003. Norton has never cross-appealed. On May 2, 2003, Spencer moved the First Circuit to stay the Order granting the writ, and the First Circuit allowed the motion on July 7, 2003. *Norton v. Spencer*, First Circuit No. 03-1571. The First Circuit heard argument on September 11, 2003. App. 1.

On October 30, 2003, the First Circuit affirmed the granting of the writ in *Norton v. Spencer*, 351 F.3d 1 (CA1 2003). On December 2, 2003, the First Circuit denied Spencer's Motion for Rehearing and Suggestion of Hearing En Banc. Spencer then moved the First Circuit to stay the mandate so that he could file

the instant petition with this Honorable Court. The First Circuit granted that motion on December 5, 2003, and Spencer hereby submits this Petition for a Writ of Certiorari. See *Norton v. Spencer*, First Circuit No. 03-1571.

2. *The First Circuit's Decision*

The First Circuit held that, where the state trial court denied the motion for new trial and made no express credibility determination regarding the supporting affidavits, an inference that the trial judge disbelieved, or even considered, the affidavits need not be drawn by a federal habeas court. Unlike the state Appeals Court, the First Circuit stated that it was "unwilling" to make such an inference. The First Circuit held that the state court's finding that the trial judge viewed the affiants as incredible was an "unreasonable determination of the facts," under the Antiterrorism and Effective Death Penalty Act ("AEDPA"). App. 8-10.

The First Circuit further held that, contrary to the state Appeals Court's determination (or, in the First Circuit's view, the Appeals Court's "impli[cation]"), the affidavits were admissible at trial as a matter of Massachusetts evidentiary law. App. 12-13. The First Circuit affirmed the district court's granting of the writ and subsequent order that Norton be retried, as though the information contained in the affidavits were not mere allegations but established facts.

REASONS FOR GRANTING THE WRIT

I. THE FIRST CIRCUIT'S DECISION CONFLICTS WITH THIS COURT'S HOLDINGS IN *MARSHALL V. LONBERGER* AND *LAVALLEE V. DELLE ROSE.*

In *Marshall v. Lonberger*, 459 U.S. 422, 433 (1982), this Court held that a federal habeas court should infer from a state court's denial of a motion for new trial that the "failure to grant relief is tantamount to a finding against the credibility of the defendant." See also *LaVallee v. DelleRose*, 410 U.S. 690, 692 (1973) (same). In granting the writ of habeas corpus here, however, the First Circuit's reasoning conflicts with the above precedent of this Court and other Courts of Appeals. As the Seventh Circuit noted in an analogous situation:

> "It is regrettable that [the trial judge] did not make an explicit determination of credibility on the record, but it is plain from the context - and the treatment of the case by the [state] Supreme Court [] - that he indeed made this determination. . . . [The petitioner] has not offered new affidavits or any other evidence calling into question the decision of the state courts. He relies essentially on the proposition that because the deponents' statements were uncontradicted the judge was required to credit them. This is not the law. A judge may disbelieve testimony and he may do this even without giving reasons. Here the ground of a credibility decision was apparent - the judge's experience at trial coupled with the vagueness of the depositions - and we therefore think the findings entitled to force now").

United States ex rel. Jones v. DeRobertis, 766 F.2d 270, 272-273 (CA7), *cert. denied*, 475 U.S. 1053 (1986).

Thus, in the instant case, almost exactly as in the above cases, the failure of the state trial court to grant relief is tantamount to a finding against the credibility of Norton's affiants, and is, therefore, in the First Circuit's own words, "quintessentially a matter of fact, reserved in almost every circumstance for the trier." *Sanna v. DiPaolo*, 265 F.3d 1, 10 (CA1 2001). Accordingly, such a factual finding is presumptively correct, and can only be overcome by clear and convincing evidence to the contrary. See 28 U.S.C. § 2254(e)(1). Norton has never made, or been asked to make, such a showing. He will instead simply receive a new trial, approximately twelve years after his conviction for several counts of indecent assault and battery on a child. Such a windfall for Norton is simply not in the public interest.

Indeed, the First Circuit, like the district court before it, rejected the inference that the state trial court implicitly disbelieved the affidavits, and inferred contrarily that the affidavits were not considered at all by the state court. The First Circuit, again like the district court, then based its *Brady* analysis on a fundamentally flawed premise: that the allegations presented in the affidavits were true. This has never been established by Norton, and certainly has never been conceded by petitioner. It has instead simply been asserted by Norton's affiants.

Furthermore, as discussed above, in denying the motion for new trial and disbelieving those same affidavits, the state trial court implicitly found that the Commonwealth never possessed such information.[1] The federal habeas court apparently made the

---

[1]Indeed, the First Circuit noted in its opinion that "it is undisputed that the prosecutor never provided Norton with the information contained in the affidavits." *Norton*, 351 F.3d at 7. Of course, given the state trial judge's implicit disbelief of the

opposite factual finding, in contravention of the AEDPA, and proceeded with its analysis under *Brady*.[2] That contrary factual finding infected and undermined the federal habeas court's subsequent *Brady* analysis, rendering that analysis fundamentally incorrect.

Such a conclusion by the federal court squarely conflicts with the longstanding authority discussed above, and is particularly inappropriate in the federal habeas context, where Norton's case has "run the entire gamut of a state judicial

---

affidavits, it is a primary, historical fact that the events described in the affidavits never happened. There was simply no "information" for the prosecutor to provide. Once again, the federal habeas court proceeds as if the affidavits constituted established facts. This is incorrect; in state court, the crucial, contrary factual finding, that the affidavits were not credible, was already made in the Commonwealth's favor by the state trial judge.

[2]As noted, the district court gave Spencer an opportunity to rebut the affidavits if he chose to by way of an evidentiary hearing. App. 4. Such a proceeding, however, would have entirely undercut the fact that the state courts had already found the affidavits to be incredible as a matter of fact, and, under those circumstances, saw no need in state post-trial proceedings for the Commonwealth to attempt to rebut the allegations by way of counter-affidavits or live testimony. "A party need not put in any evidence if it thinks the other side's claims feeble, and the state put in none at the post-trial hearing. . . . Its choice to be silent was one the prosecutors were free to make without the creation of a compulsory inference that the state had something to hide." *Jones*, 766 F.2d at 274.

system." *Sumner v. Mata*, 449 U.S. 539, 551 (1980).[3] Requiring

---

[3]Indeed, the practice of ruling on new trial motions as the state trial court did here is more than well-established in Massachusetts, and the First Circuit's erroneous ruling improperly calls into question this standard state practice, as elucidated by the SJC in a 1971 decision:

> "The weight and import of the affidavits submitted [in support of the new trial motion] were likewise for the trial judge's discretion. *Commonwealth v. Heffernan*, 350 Mass. 48, 53 [, 213 N.E.2d 399 (1966)]. He did not have to accept them as true even though they were undisputed. *Commonwealth v. Sacco*, 255 Mass. 369, 450 [, 151 N.E. 839 (1926)]. *Commonwealth v. Millen*, 290 Mass. 406, 410 [, 195 N.E. 541 (1935)]. *Commonwealth v. Doyle*, 323 Mass. 633, 637 [, 84 N.E.2d 20 (1949)]. *Commonwealth v. Coggins,* 324 Mass. 552, 557 [, 87 N.E.2d 200 (1949)]. In weighing the new evidence presented he was entitled to make use of his knowledge of what had taken place at the trial (*Commonwealth v. Sacco*, supra, at 451; *Commonwealth v. Chin Kee,* 283 Mass. 248, 257 [, 186 N.E. 253 (1933)]), and he was not required to give reasons for his action. *Commonwealth v. Sacco*, supra, at 450. Finally, there was no requirement that the judge hear oral testimony in support of the affidavits; he was free to choose the procedure by which he would consider the motion. *Commonwealth v. Millen*, supra, at 410. *Commonwealth v. Coggins*, supra, at 556-557. *Commonwealth v. Heffernan,* supra, at 54.

the state court to say explicitly what is obvious implicitly "would place the federal court in just the kind of tutelary relation to the state courts that the [AEDPA] was designed to end." *Hennon v. Cooper*, 109 F.3d 330, 335 (CA7), *cert. denied*, 522 U.S. 819 (1997). Indeed, the federal courts here have invalidated Norton's several convictions simply because he "may have been the victim not of any constitutional error but merely of a failure of judicial articulateness." *Id.* See also *Rashad v. Walsh*, 300 F.3d 27, 45 (CA1 2002) ("It is not our function . . . to grade a state court opinion as if it were a law school examination"). The First Circuit erred, and acted in conflict with this Court's precedents,[4]

Commonwealth v. DeChristoforo, 360 Mass. 531, 543, 277 N.E.2d 100, 108 (1971). See also *Commonwealth v. Cook*, 438 Mass. 766, 774, 784 N.E.2d 608, 614 (2003) ("The judge denied the motion [for new trial] without making any specific comments on the credibility of the defendant's submissions. It can be inferred from the judge's denial of the defendant's motion, however, that he discredited the defendant's contentions stated in his affidavits and elsewhere").

[4]The First Circuit's attempt to distinguish the above cases is unpersuasive. The First Circuit held that "an inference that the affiants were incredible is not 'fairly supported by the record.'" App. 8. The First Circuit primarily relied on the fact that there was, in the instant case, no "lengthy hearing on the affidavits." App. 9. As the First Circuit has itself once observed, however:

> Courts are busy places. We have repeatedly stated that, even in the criminal context, a defendant is not entitled as of right to an evidentiary hearing on a pretrial or posttrial motion. . . . In most situations, motions can be "heard" effectively on the papers, with the parties

when it held that the state trial court's denial of the new trial motion was not tantamount to a presumptively correct finding of fact regarding the credibility of the affidavits, to which deference must be given pursuant to the AEDPA. See *Parker v. Head*, 244 F.3d 831, 837 (CA11 2001) (citing 28 U.S.C. § 2254 (e)(1)). This Court should grant the instant petition for certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

II. THE FIRST CIRCUIT'S HOLDING THAT THE AFFIDAVITS WERE ADMISSIBLE AT TRIAL IN STATE COURT CONFLICTS WITH THE STATE APPEALS COURT'S DETERMINATION THAT THE AFFIDAVITS WERE NOT ADMISSIBLE IN STATE COURT.

Even assuming that the state court believed the petitioner's proffered affidavits, the Massachusetts Appeals Court held that the statements of these witnesses would not have been admissible at trial in state court. The First Circuit had no authority to overrule this authoritative determination of state law. To the contrary, the federal habeas court was bound by it. Indeed, in a footnote in its opinion, the First Circuit considered

---

> submitting evidentiary proffers by means of affidavits, documentary exhibits, and the like.

United States v. McGill, 11 F.3d 223, 225 (CA1 1993) (internal citations omitted). These observations apply just as well to busy state courts. The First Circuit's reasoning here, however, effectively deprives state courts of the benefit of the deferential AEDPA standard when a motion, like the one in this case, is "heard" on the papers.

the question of whether the evidence was admissible in a Massachusetts court, and held the following:

> The state courts never directly addressed whether the material in Noel's or Rodriguez's affidavits was admissible. The MAC did say, however, that Rodriguez's affidavit was 'one further level of hearsay removed from the allegedly recanting victim,' implying that both affidavits were inadmissible hearsay. Noel's affidavit is admissible, however, because of the prior inconsistent statement exception to the hearsay rule. See *Commonwealth v. Daye*, 469 N.E.2d 483, 490-491 (Mass. 1984).

Norton, 351 F.3d at n.3.

Thus, the First Circuit has overruled the Massachusetts Appeals Court on a matter of pure state evidentiary law,[5] of

---

[5]The First Circuit implies that the state court made no actual determination regarding the admissibility of the evidence, and it appears to have made that pure state law determination *de novo* itself. Such a hypertechnical critique of a state appellate court decision, however, would be "grad[ing] a state court opinion as if it were a law school examination," *Rashad*, 300 F.3d at 45, a method of federal habeas review that Congress ended when it enacted the AEDPA. *Hennon*, 109 F.3d at 335. Indeed, the Massachusetts Appeals Court stated flatly that the affidavits were hearsay, and, in discussing the affidavits, the Appeals Court specifically cited *Commonwealth v. DeChristoforo*, where post-trial affidavits were properly rejected because "much of the information stated in the affidavits was hearsay and would not have been admissible in that form in any event." *DeChristoforo*, 277 N.E.2d at 108. The Massachusetts cases cited by the First

which the state courts are the final arbiter. This the First Circuit could not do. As this Court has emphatically stated: "'federal habeas corpus relief does not lie for errors of state law.' . . . it is not the province of a federal habeas court to reexamine state court determinations of state law questions." *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (internal citations and quotations omitted). This is so especially when the state evidentiary ruling is embedded in a federal *Brady* analysis. See *Breedlove v. Moore*, 279 F.3d 952, 963-964 (CA11 2002) (in applying *Brady* standard, Florida Supreme Court's determination that evidence was inadmissible was binding on federal habeas court "absent extreme circumstances").

In the instant case, the First Circuit determined that the state court incorrectly held that such evidence was inadmissible in a Massachusetts courtroom, effectively overruled the state court on that state evidentiary issue, and then affirmed the grant of the writ. This was contrary to relevant precedent of this Court,[6] and to well-established principles of comity and

---

Circuit in support of its conclusion that the evidence was instead admissible are, in any event, both inapposite and easily distinguishable.

[6]This result is also contrary to the First Circuit's own precedents. As that court once stated:

> Habeas review does not ordinarily extend to state court rulings on the admissibility of evidence. The federal judiciary holds no roving commission to monitor case-by-case compliance with rules of evidence in the trial courts of the several states. Thus, our role is not to determine whether [certain] testimony was admissible under the state's evidentiary precedents. In that regard, we

federalism. The First Circuit here erroneously held that a federal habeas court is the ultimate authority on state evidentiary issues, and this Court should grant certiorari.

CONCLUSION

For the reasons stated above, the Court should issue a writ of certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

Respectfully submitted,

THOMAS F. REILLY
Attorney General of Massachusetts

CATHRYN A. NEAVES*
Assistant Attorney General

DEAN A. MAZZONE
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

**Counsel of Record*

March 1, 2004

> are bound - by the Massachusetts court's interpretation of [its] evidentiary law.

Puleio v. Vose, 830 F.2d 1197, 1204 (CA1 1987) (internal citations and quotations omitted).

APPENDIX

351 F.3d 1

United States Court of Appeals,
First Circuit.

ROGER NORTON
v.
LUIS SPENCER.
Heard Sept.. 11, 2003.
Decided Oct. 30, 2003.

Defendant convicted in state court of four counts of indecent assault and battery on person under age of 14, 40 Mass. App. Ct. 1121, 664 N.E.2d 883, petitioned for writ of habeas corpus. The United States District Court for the District of Massachusetts, Michael A. Ponsor, J., granted petition. State appealed. The Court of Appeals, Toruella, Circuit Judge, held that: (1) Antiterrorism and Effective Death Penalty Act (AEDPA) standard governed habeas proceeding; (2) findings by state appellate court were unreasonable determinations of fact, as would warrant habeas relief; and (3) Brady violation warranted habeas relief.

Affirmed.

Dean A. Mazzone, Assistant Attorney General, Criminal Bureau, with whom Thomas F. Reilly, Attorney General, were on brief, for appellant.

Stewart T. Graham, Jr., with whom Graham & Graham, was on brief, for appellee.

Before: TORUELLA and LIPEZ, Circuit Judges, and SCHWARZER,[6] Senior District Judge.

TORRUELLA, Circuit Judge.

Roger Norton, petitioner-appellee, defends the district court's order granting his writ of habeas corpus. After careful review, we affirm.

I. Background

Roger Norton ("Norton"), was accused of sexually assaulting Hector Fuentes ("Fuentes"), an eleven year old child. Fuentes reported Norton's alleged indecent assault to the state police after he discovered his cousin, Noel Rodriguez ("Noel"), crying inside Norton's camper. Noel also told the police that he was indecently assaulted by Norton.

Following a pretrial hearing in Massachusetts Superior Court, the trial judge ruled that Noel was not competent to testify because he refused to answer questions regarding where Norton had allegedly touched him. As a result, the Commonwealth of Massachusetts ("Commonwealth") did not proceed on the indictment alleging that Norton indecently assaulted Noel. The Commonwealth did proceed, however, on the charges against Norton alleging he indecently assaulted Fuentes.

Fuentes was the only witness to testify to the incidents at trial. He testified that Norton grabbed his genitalia, without consent, at least three times. Fuentes also testified that Norton asked him to have sex on more than one occasion.

---

[6] Of the Northern District of California, sitting by designation.

Norton was convicted on four counts of indecent assault and battery on a child under the age of fourteen, and sentenced to incarceration in state prison. On appeal, the Massachusetts Appeals Court ("MAC") affirmed the conviction in *Commonwealth v. Norton*, 664 N.E.2d 883 (Mass. App. Ct. 1996) ("Norton I"). The Massachusetts Supreme Judicial Court ("SJC") denied Norton's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 667 N.E.2d 1159 (Mass. 1996) ("Norton II").

Some time after the SJC denied Norton's application for further appellate review, Norton made two discoveries that he argued constituted "new evidence" under 28 U.S.C. § 2245(d)(1)(D). The first discovery involved the timing of the assaults. At trial, the prosecution established that the alleged assaults occurred in late 1989, around the time Fuentes's mother was in the hospital giving birth. Norton later discovered the birth certificate of Fuentes's sibling, who was born in July 1989, not late 1989. Norton also obtained affidavits stating that he was not a guest in Fuentes's cousin's house, the place where the alleged assaults occurred, in July 1989.

Second, Norton obtained affidavits from Noel and Noel's mother, Maria Sonia Rodriguez ("Rodriguez"), stating that Noel had fabricated his allegation against Norton at the insistence of Fuentes and that Fuentes also fabricated his allegations. Further, Rodriguez added that the Assistant District Attorney and another person repeatedly told Noel and Fuentes how to testify even after Noel informed them that none of it was true and that Fuentes had made it all up. It is undisputed that the prosecutor never provided Norton with the information contained in Noel's or Rodriguez's affidavits.

Norton moved for a new trial before the original trial judge based on the new evidence. The motion was denied. The

MAC affirmed the denial of Norton's motion for new trial in *Commonwealth v. Norton*, 728 N.E.2d 972 (Mass. App. Ct. 2000) ("Norton III"). The SJC denied Norton's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 738 N.E.2d 354 (Mass. 2000) ("Norton IV").

Norton then filed a writ of habeas corpus in the United States District Court for the District of Massachusetts ("district court") claiming, inter alia, that the prosecution violated rights afforded by *Brady v. Maryland*, 373 U.S. 83 (1963). The district court ordered that Norton's writ of habeas corpus be allowed unless the Commonwealth timely filed a request for an evidentiary hearing. *Norton v. Spencer*, 253 F. Supp. 2d 65, 76 (D. Mass. 2003) ("Norton V"). The Commonwealth did not file such a request. Rather, the Commonwealth filed a motion to reconsider. The district court denied the motion and ordered the habeas writ be granted unless the Commonwealth instituted proceedings to retry Norton. *Norton v. Spencer*, 256 F. Supp. 2d 120 (D. Mass. 2003) ("Norton VI"). The Commonwealth moved for a stay of the district court's order granting Norton's request for habeas relief with this Court. This Court granted the stay pending disposition of this appeal.

II. Analysis

A. Standard of Review for the District Court

The first question in this case is whether the district court used the proper standard of review when it granted habeas relief. In reviewing a judgment on a petition for a writ of habeas corpus, this Court examines the legal conclusions of the district court, including the proper standard of review, de novo. *Almanzar v.*

Maloney, 281 F.3d 300, 303 (1st Cir. 2002), *cert. denied*, 537 U.S. 817 (2002).

The Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")

> prohibits a federal court from granting an application for a writ of habeas corpus with respect to a claim adjudicated on the merits in state court unless that adjudication resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.

Williams v. Taylor, 529 U.S. 362, 399 (2000) (internal quotations omitted). However, "AEDPA's strict standard of review only applies to a claim that was adjudicated on the merits in state court proceedings." *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001), cert. denied, 535 U.S. 1018 (2002); see also *Ellsworth v. Warden*, 333 F.3d 1, 6 (1st cir. 2003).[6] If a claim was not adjudicated on the merits in a state court proceeding, then the issue is reviewed *de novo*. Id.

The parties disagree as to whether Norton's federal claim under *Brady v. Maryland*, 373 U.S. 83 (1963) was adjudicated on the merits in the state court proceeding. In denying Norton's motion for new trial, the trial court stated that Norton

> filed a motion for a new trial raising the same issues as were raised on the direct appeal or that could have been raised. [Norton's attorney] . . .

---

[6] The Commonwealth argues that *Fortini* is undermined by *Early v. Packer*, 537 U.S. 3, 123 S.Ct. 362, 154 L.Ed.2d 263 (2002). We rejected this argument in *Ellsworth*, 333 F.3d at 6 n. 1.

> did an excellent job in cross-examining witnesses and developing any inconsistencies. The incident in [Norton's] trailer was addressed at trial at some length. The defendant is unhappy at the facts the jury felt were proved. Other matters of 'new evidence' were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so . . . As trial judge at the time I do not feel that any of the issues raised by [Norton] has merit deserving a new trial. Norton got a full fair trial with competent counsel.

In affirming the trial judge's decision, the MAC wrote that the "weight and important of [the] affidavits were for the trial court's discretion. [The trial judge] was not required to accept the statements as true even if they were undisputed. Thus, the judge could properly determine that these affidavits did not demonstrate any bad faith on the part of the prosecutor." *Norton III*, 728 N.E.2d at 972 (citations omitted). The MAC further explained that "[i]n light of the fact that much evidence at the trial was equally calculated to discredit the victim [Fuentes], the judge could properly regard the affidavits as largely cumulative in their basic effect. Undisclosed evidence that is cumulative does not normally require a judge to grant a new trial." *Id.* (citing *Commonwealth v. Tucceri*, 589 N.E.2d 1216 (1992)).

The district court held that "no state court remotely addressed" Norton's federal *Brady* claim. *Norton V.*, 253 F. Supp. 2d at 71. As a result, the district court applied de novo review. Id. at 72. We hold that applying *de novo* review was inappropriate as the MAC did address the *Brady* issue. The MAC, citing to *Tucceri,* 589 N.E.2d 1216, held that undisclosed evidence that is cumulative does not require a new trial. *Norton III*, 728 N.E.2d at 972. As we have previously held, "*Tucceri* states explicitly that it is articulating a state law standard that is

more favorable to defendants than the Federal Constitutional [*Brady*] standard." *McCambridge v. Hall*, 303 F.3d 24, 35 (1st cir. 2002) (internal quotations and citation omitted). When, as here, there is a state case "that explicitly says that the state adheres to a standard that is more favorable to the defendants than the federal standard . . . we will presume the federal law adjudication to be subsumed within the state law adjudication." Id. Since the MAC addressed the *Brady* issue, the district court should not have reviewed the case de novo.

B. The AEDPA Standards

Norton's claim must be analyzed under the AEDPA standards because the federal claim was adjudicated in the state court proceeding. AEDPA precludes a habeas court from granting relief, unless the state court holding "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d)(1)-(2). The Supreme Court has stated: "Under the "contrary to" clause, a federal habeas court may grant the writ if the state court arrives at a conclusion opposite to that reached by this Court on a question of law or if the state court decides a case differently than this Court has on a set of materially indistinguishable facts." *McCambridge*, 303 F.3d at 36 (citing *Williams v. Taylor*, 529 U.S. at 412-13).

It is difficult to determine how to approach the analysis under AEDPA because neither the trial judge nor the MAC provided a thorough explanation of their decisions. Fortunately, the result is the same whether the case is viewed as an unreasonable determination of the facts in light of the evidence presented in the state court proceeding or an unreasonable application of clearly established federal law.

C. Unreasonable Determination of the Facts

A "determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting the presumption of correctness by clear and convincing evidence." 28 U.S.C. § 2254(e)(1). The "presumption of correctness is equally applicable when a state appellate court, as opposed to a state trial court, makes the finding of fact." *Sumner v. Mata,* 455 U.S. 591, 593, 102 S.Ct. 1303, 71 L.Ed.2d 480 (1982).

The Commonwealth argues that, by denying Norton's motion for a new trial, the trial court implicitly found the affidavits to be incredible.[7] We disagree. Unlike cases holding that a failure to make an express ruling is tantamount to a finding against the credibility of the affiants, there is no indication that the trial court ever viewed or evaluated the affidavits. Further, an inference that the affiants were incredible is not "fairly supported by the record." See *Marshall v. Lonberger*, 459 U.S. 422, 103 S.Ct. 843, 74 L.Ed.2d 646 (1983) (implying a lack of credibility in the absence of an express finding after extensive hearings and support in the record); *LeValle v. Delle Rose*, 410 U.S. 690, 695, 93 S.Ct. 1203, 35 L.Ed.2d 637 (1973)(implying a ruling where there is "every indication [the trial judge] applied the correct standards."); *United States v. Jones*, 766 F.2d 270 (7th Cir. 1985)(implying that the trial court found the affidavits incredible,

---

[7] In connection with this argument, the Commonwealth argues that Norton's *Brady* claim in the habeas petition was untimely because the trial court made implicit credibility determinations. Since we reject the implicit finding argument, we also reject the argument that the *Brady* claim was untimely. We hold that Norton's claim was timely under the AEDPA.

absent an express finding, because only one of the fifteen witnesses had recanted and recantations are treated with great skepticism). In Norton's case, the trial judge did not hold a lengthy hearing on the affidavits or make any findings of fact. Nor was there evidence in the record impugning the credibility of Noel or Rodriguez. Although the trial judge had held Noel incompetent to testify because he refused to answer questions regarding where he was touched, the trial judge never rules, or suggested, that Noel was incredible. We are unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference.

This is especially true when the language used by the trial court suggests that it did not even consider the credibility of the affidavits. The trial court order stated that Norton "filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised." However, the part of the motion for a new trial dealing with the affidavits involved new evidence that was not available and could not have been raised on direct appeal. This language suggests that the trial court did not evaluate the affidavits in ruling on the motion for a new trial, much less that the trial court implicitly found the affidavits to be incredible.

In affirming the denial of Norton's motion for new trial, the MAC stated that the trial judge "was not required to accept the [affidavits] as true" and "[i]n light of the fact that much evidence at trial was equally calculated to discredit the victim [Fuentes], the judge could properly regard the affidavits as largely cumulative in their basic effect." *Commonwealth v. Norton*, 49 Mass. App. Ct. 1110, 728 N.E.2d 972. These statements can be interpreted as findings of fact.

As previously discussed, a finding that the trial judge viewed the affiants as incredible is an unreasonable determination of the facts. In addition, we agree with the district court that the state court's finding that "the affidavits were necessarily incredible or merely cumulative" is an unreasonable determination of the facts in light of the evidence presented. After all, evidence cannot be cumulative when it goes to an issue that was not known at the time of trial.

It is well established that "impeachment evidence that is merely cumulative . . . is insufficient to establish prejudice under Brady." *United States v. Garcia-Torres*, 341 F.3d 61 (1st Cir. 2003) citing *United States v. Martinez-Medina*, 279 F.3d 105 (1st Cir. 2002). A determination that the affidavits were cumulative, however, is an unreasonable determination of the facts in light of the evidence in the record. Cf. *Conley v. United States*, 323 F.3d 7, 30 (1st Cir.2003)(evidence was cumulative because defendant was already aware of essential facts that would allow him to take advantage of the exculpatory evidence at issue); *United States v. Garcia-Torres*, 331 F.3d at 71 (evidence was cumulative when there was substantial other evidence of the appellants' involvement in the conspiracy); *Lugo v. Munoz*, 682 F.2d 7, 9 (1st Cir. 1982) (evidence was cumulative because the facts which petitioner alleges to have been suppressed were a matter of public record). As a result, we accord no deference to the appellate court's reconstruction of the lower court's decision. See *Parker v. Dugger*, 498 U.S. 591, 597 (1982) (reviewing court overturned a state court decision not supported by the record using a less rigorous standard under the previous habeas statute).

The trial court made no finding that the affidavits were cumulative nor did it mention the affidavits in denying Norton's motion. As the Commonwealth admitted, there was no other evidence against Fuentes directly establishing that the claims were fabricated. The affidavits, therefore, cannot be classified as

cumulative. Further, the MAC claimed that the trial judge "could" properly regard the affidavits as cumulative. It did not hold that the trial court did regard the affidavits as cumulative.

D. Unreasonable Application of Clearly Established Law

We also agree with the district court that the state court decisions are an unreasonable application of clearly established federal law – a holding utterly inconsistent with *Brady*. It is not always clear when a decision is an unreasonable application of federal law. "If it is a close question whether the state decision is in error, then the state decision cannot be an unreasonable application." *McCambridge*, 202 F.3d at 36. An unreasonable application exists, however, when there "is some increment of incorrectness beyond error." Id. (citation omitted). "The increment need not necessarily be great, but it must be great enough to make the decision unreasonable in the independent and objective judgment of the federal court." Id. A state court decision may be "unreasonable if it is devoid of record support for its conclusion or is arbitrary." Id. at 37 (citing *O'Brien v. Dubois*, 145 F.3d 16, 25 (1st Cir. 1998)). For the reasons discussed below, we find the state court's decision arbitrary and devoid of reason.

When addressing a challenge to the legitimacy of a criminal prosecution based upon a failure of the prosecution to disclose exculpatory evidence, courts must consider whether: (1) the evidence is favorable to the accused; (2) the evidence was suppressed by the state; and (3) the petitioner was prejudiced. *Strickler v. Greene*, 527 U.S. 163, 281-282 (1999). Indeed, "[w]hen the reliability of a given witness may well be determinative of guilt or innocence, nondisclosure of evidence affecting credibility falls within this general rule." *Giglio v. United States*, 405 U.S. 150, 153-154, 92 S.Ct. 763, 31 L.E.2d 104 (1972) (internal quotations and citation omitted). Noel's affidavit established that he "made up the story against [Norton]

because my cousin [Fuentes] told me to." The affidavit also established that Fuentes had told Noel that he too "had made up" the story about Norton. Such information is evidence that is clearly favorable to the accused and would have substantially undermined his judgment of guilt if it had been presented at Norton's trial.

Second, it is undisputed that the prosecutor never provided Norton with the information contained in the affidavits.

Third, Norton was prejudiced by the failure to disclose the information contained in the affidavits. Fuentes was the only witness describing the alleged assaults that led to Norton's conviction, thus withholding impeachment evidence that Fuentes lied about the assault was prejudicial to Norton. See *Napue v. Illinois*, 360 U.S. 264, 269, 79 S.Ct. 1173, 3 L.Ed.2d 1217 (1959) (holding that "[t]he jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence"). Prejudice only leads to the undoing of a conviction, however, when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different, a reasonable probability here being one that is sufficient to undermine confidence in the outcome." *Ellsworth v. Warden*, 333 F.3d at 4 (citing *United States v. Bagley*, 473 U.S. 667, 682, 105 S.Ct. 3375, 87 L.E.2d 481 (1985)).[8] Confidence in the outcome is particularly doubtful

---

[8] It is true that "[i]nadmissible evidence is by definition not material." *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983); but see *Ellsworth*, 333 F.3d at 5 (holding that "evidence itself inadmissible could be so promising a lead to strong exculpatory evidence that there could be no justification for withholding it.") The state courts never directly addressed whether the material in Noel's or Rodriguez's affidavits were

when the withheld evidence impeaches a witness whose "testimony is uncorroborated and essential to the conviction." *United States v. Martinez Medina*, 279 F.3d 105, 126 (1st Cir. 2002) (citing *Giglio v. United States*, 405 U.S. at 154-55). Fuentes's testimony was uncorroborated and essential to Norton's conviction as he was the only witness to testify to the alleged indecent assaults. Therefore, there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome could have been different.

III. Conclusion

We therefore affirm the district court's conclusion that habeas be granted.

---

admissible. The MAC did say, however, that Rodriguez's affidavit was "one further level of hearsay removed from the allegedly recanting victim," implying that both affidavits were inadmissible hearsay. *Norton* III, 728 N.E.2d at 972. Noel's affidavit is admissible, however, because of the prior inconsistent statement exception to the hearsay rule. See *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E.2d 483, 490-91 (Mass. 1984) (restating the established rule that prior inconsistent statements are admissible for the purpose of impeaching the credibility of a witness's testimony). Rodriguez's affidavit is admissible because personal observations that the prosecutor improperly coached the witness are not hearsay. See *Commonwealth v. Ortiz-Soto*, 49 Mass. App. Ct. 645, 731 N.E.2d 553, 555 n. 2 (Mass. App. Ct. 2000) (stating that personal observations are not hearsay).

COMMONWEALTH

vs.

ROGER NORTON

MEMORANDUM AND ORDER PURSUANT TO RULE 1:28

The defendant was convicted by a Superior Court jury of four counts of indecent assault and battery on a child under the age of fourteen under G.L. c. 265, § 13B, and his convictions were affirmed on direct appeal. See *Commonwealth v. Norton*, 40 Mass. App. Ct. 1121 (1996). His application for further appellate review was denied. See *Commonwealth v. Norton*, 423 Mass. 1103 (1996). Subsequently, the defendant filed a motion for a new trial on the grounds of newly discovered evidence, prosecutorial misconduct, and ineffective assistance of counsel, which the motion judge, who was also the trial judge, denied without an evidentiary hearing.[9] The defendant appeals, *pro se*, from the trial judge's order denying his motion for a new trial.

A decision to allow a motion for a new trial lies within the sound discretion of the trial judge and his decision will not be reversed unless it is manifestly unjust. See *Commonwealth v. Schand*, 420 Mass. 783, 787 (1995). Where, as here, the motion judge was also the trial judge, his decision is entitled to special deference. See *Commonwealth v. Figueroa*, 422 Mass. 72, 77 (1996).

---

[9]The defendant also had filed a request for an evidentiary hearing, along with a motion for appointment of counsel, and a motion for leave to amend the motion for new trial.

1. The defendant contends that the birth certificate of the complainant's brother, documents describing the front window of the defendant's trailer, and affidavits of eleven individuals (including the defendant) constitute newly discovered evidence requiring a new trial. We are inclined to doubt that the proffered evidence was in fact "newly discovered."[10] We place our decision, however, on the ground that the evidence was cumulative of other evidence admitted at trial. See *Commonwealth v. Grace*, 397 Mass. 303, 305-306 (1986) ("newly discovered evidence that is cumulative of evidence admitted at the trial tends to carry less weight than new evidence that is different in kind").

The complainant testified at trial that two of the assaults took place at the home of his aunt and uncle (the Colons) and occurred when he was staying with the Colons while his mother was in the hospital giving birth to his younger brother.[11] Three members of the Colon household testified on behalf of the defendant that the complainant had never slept over at the Colon home and had never visited the Colon home without his parents. As grounds for a new trial, the defendant now offers (1) a birth certificate indicating that the complainant's brother was born on June 7, 1989, and (2) affidavits of four members of the Colon household, three of whom testified at trial, stating that the complainant did not sleep over the Colon home on June 7, 8, or

---

[10]The Commonwealth argues that the proffered evidence is not "newly discovered" as the evidence was known and available to the defendant at the time of trial in 1992. See *Commonwealth v. Grace*, 397 Mass. 303, 306 (1986).

[11]Two volumes of the trial transcript apparently have been mislabeled. We refer to the transcript of August 17, 1992 as volume IIA and the transcript of August 18, 1992 as volume III.

in 1989. The birth certificate and affidavits are cumulative of the testimony presented by the affiants at trial, and there was little likelihood that the added details would have caused the jury to reach a different conclusion. See *Commonwealth v. Figueroa*, 422 Mass. at 79, quoting from *Commonwealth v. Grace*, 397 Mass. at 306 ("standard for [granting new trial due to] newly discovered evidence is whether 'there is a substantial risk that the jury would have reached a different conclusion had the evidence been admitted at trial'").

Evidence regarding the front window of the defendant's trailer, through which the complainant testified he saw the defendant standing naked,[12] was also cumulative. As the trial judge found in his memo denying the defendant's new trial motion, "[t]he incident in the defendant's trailer was addressed at trial at some length." Defense counsel had elicited a description of the trailer's front window from the complainant on cross-examination. In addition, a witness familiar with the defendant's trailer had testified regarding the dimensions of the window and trial counsel had used this evidence in his closing argument to challenge the complainant's testimony.[13]

---

[12]The complainant testified that, on one occasion, the defendant called to him from inside his trailer and that he could see through the front window of the trailer that the defendant was naked. The complainant stated that he went inside the trailer and the defendant offered him five dollars to have sex with him.

[13]In his closing, defense counsel stated, "I would question how [the complainant] is going to see [the defendant] naked through the window. You heard the description of the window from Mr. Farrell, how it's about five and a half or six feet off the ground and the dimensions of the window. You can imagine it's going to be high up on the trailer. [The complainant] said he

It is also worth observing that both the birth certificate and trailer specification evidence were offered to contradict the complainant's testimony. "Newly discovered evidence that tends merely to impeach the testimony of a witness does not ordinarily warrant a new trial." *Commonwealth v. Simmons*, 417 Mass. 60, 72 (1994). See *Commonwealth v. Grace*, 370 Mass. 746, 752-753 (1976) (proffered testimony contradicted trial testimony).

2. Next, the defendant argues that several instances of prosecutorial misconduct warrant a new trial. First, the defendant asserted that the prosecutor committed misconduct by failing to notify defense counsel that she had been informed, prior to trial, that the complainant had admitted he had fabricated the charges against the defendant. In support of this claim, the defendant offered the affidavits of Noel and Maria Rodriguez stating that Maria had informed the prosecutor that the complainant had told Noel that he had "made up" his story about the defendant. The weight and import of these affidavits were for the trial judge's discretion. See *Commonwealth v. DeChristoforo*, 360 Mass. 531, 543 (1971). He was not required to accept the statements as true even if they were undisputed. See ibid. Thus, the judge could properly determine that these affidavits did not demonstrate any bad faith on the part of the prosecutor. See *Commonwealth v. Fazio*, 375 Mass. 451, 454 (1978) (bad faith will not be presumed); *Commonwealth v. Errington*, 390 Mass. 875, 883 (1984).

Moreover, the affidavits were not those of trial witnesses who later recanted. Rather, they were in Noel's case a statement to the effect that the victim told Noel that "he had made up a story" about the defendant, and, in the mother, Maria Rodriguez's

---

could see the defendant's whole body inside the trailer through that window. It makes absolutely no sense at all."

case, one further level of hearsay removed from the allegedly recanting victim. In light of the fact that much evidence at the trial was equally calculated to discredit the victim, the judge could properly regard the affidavits as largely cumulative in their basic effect. Undisclosed evidence that is cumulative does not normally require a judge to grant a new trial. See *Commonwealth v. Tucceri*, 412 Mass. 401, 414 (1992).

The defendant also asserts that the prosecutor improperly asked Maria Colon to "explain to the jury about some deed that [the defendant] gave you to hold?" Even assuming that this question was improper, it did not prejudice the defendant. The judge sustained the defendant's objection and the witness never answered the question. In addition, the judge explicitly instructed the jury that an unanswered question did not constitute evidence, and the jury is presumed to have followed that instruction. See *Commonwealth v. Watkins*, 425 Mass. 830, 840 (1997).[14]

The defendant further claims that the prosecutor made improper comments during her opening statement and closing argument. The defendant, however, did not challenge these remarks at trial or on direct appeal, as he could have, and thus the issue is deemed waived.[15] See Mass. R. Crim. P. 30 (c) (2), 378 Mass. 901 (1979); see also *Commonwealth v. McLaughlin*, 364

---

[14]The judge instructed "If a question was asked and it was never answered or if a question was asked and it was objected to and the objection was sustained and the question contained any facts in the question . . . that's not evidence, because a person can put all kinds of facts into a question, maybe full well knowing it's never going to be answered."

[15]The defendant objected to portions of the prosecutor's opening and closing at trial. He did not, however, object to any of the comments contested on appeal.

Mass. 211, 229 (1973) ("a motion for new trial may not be used as a vehicle to compel a trial judge to review and reconsider questions of law . . . which could have been raised at the trial and in appellate review after trial but which were not so raised"). While a judge may give relief when a waived issue is raised for the first time by a motion for a new trial, this power "should be exercised only in those extraordinary cases where, upon sober reflection, it appears that a miscarriage of justice might otherwise result." See *Commonwealth v. Curtis*, 417 Mass. 619, 626 (1994). There is no such risk here.

The prosecutor's reference in her opening statement to the complainant's anticipated testimony was proper. The prosecutor was entitled to explain in her opening statement the facts she reasonably and in good faith expected to prove at trial. See *Commonwealth v. Errington,* 390 Mass. at 883. The only evidence to support the defendant's allegations that the complainant's testimony was false and the prosecutor knew it to be false are the affidavits of Noel and Maria Rodriguez. Again, the weight and import of the affidavits were for the trial judge's discretion. See *Commonwealth v. DeChristoforo*, 360 Mass. at 543.

In addition, the prosecutor's closing argument did not misstate the evidence or improperly appeal to the jury's sympathies. The prosecutor's characterization of the defendant's acts and her comment that these acts "hurt" the complainant were based on the complainant's testimony and reasonable inferences drawn from that evidence. See *Commonwealth v. Freeman*, 430 Mass. 111, 118 (1999) ("arguments based on testimony submitted at trial and its logical conclusions are proper"). The rhetorical questions posed by the prosecutor were supported by the consciousness of guilt evidence presented at trial and did not ask

the jury to engage in any improper speculation.[16] Finally, the complainant testified, over objection, that he heard his younger cousin crying inside the defendant's trailer. The prosecutor was entitled to mention this fact in her closing. See *Commonwealth v. Freeman*, 430 Mass. at 118.

3. The defendant's numerous ineffective assistance of counsel claims also are without merit.[17] "[F]ailure to make an opening statement . . . does not form the basis for a claim of ineffective assistance of counsel." *Commonwealth v. Cohen*, 412 Mass. 375, 391 (1992). In addition, trial counsel's failure to offer in evidence documents detailing the defendant's trailer did not constitute ineffective assistance of counsel. See *Commonwealth v. Medina*, 20 Mass. App. Ct. 258, 261 (1985) ("ineffective assistance is not established simply by showing that trial counsel failed to offer certain evidence"). As the evidence relating to the defendant's trailer was merely cumulative of the evidence presented at trial, see supra, counsel's failure to offer it did not deprive the defendant of an otherwise substantial, material ground of defense. See *ibid.*

---

[16]The prosecutor stated: "You may well wonder if in [the defendant]'s mind [the complainant]'s words were ringing? Was he thinking about how [the complainant] said I'm going to tell my mother? That's for you to decide."

[17]Although the defendant did not raise his ineffective assistance claims on direct appeal, the defendant's trial counsel and appellate counsel both were associated with the Committee for Public Counsel Services, and, therefore, these claims are not waived. See *Commonwealth v. Egardo*, 426 Mass. 48, 49-50 (1997).

The defendant also faults trial counsel for failing to call the complainant's mother to testify that the complainant's family had filed a civil suit against the defendant. Such testimony, the defendant contends, would have shown that the complainant had a possible bias against the defendant. Even if the defendant were correct in that assessment, aspects of the mother's testimony would have been favorable to the Commonwealth,[18] and trial counsel's decision not to call her was tactically reasonable. See *Commonwealth v. Colantonio*, 31 Mass. App. Ct. 299, 304 (1991) (not ineffective assistance to decide against introduction of evidence which although somewhat supportive was also damaging).

Lastly, trial counsel's failure to investigate the defendant's reasons for leaving the Sunledge Campgrounds, the trailer park where the defendant resided, does not amount to ineffective assistance of counsel. The Commonwealth argued at trial that the defendant's abrupt departure from Sunledge Campgrounds indicated the defendant's consciousness of guilt. The defendant urges that investigation would have revealed that the defendant left Sunledge at the "insistence of Attorney Jack Schubert with consultation from State Trooper Susan Mosman [because the] defendant's life had been threatened."[19] Without

---

[18]In the disposition of the defendant's direct appeal in a memorandum and order pursuant to Rule 1:28 of this court, we found that since the complainant testified that he told his mother about what the defendant did to him, "the mother's testimony was equally favorable to both sides." *Commonwealth v. Norton*, 40 Mass. App. Ct. 1121 (1996).

[19]Attorney Jack Schubert had provided legal advice to the defendant in the past. He did not, however, represent the defendant in this case.

corroborating affidavits from Attorney Schubert or Trooper Mosman, the judge reasonably could doubt that counsel's investigation into the defendant's reasons for leaving Sunledge "might have accomplished something material for the defense." *Commonwealth v. Satterfield*, 373 Mass. 109, 115 (1977).

4. As the Commonwealth asserts, by denying the defendant's motion for a new trial, the motion judge implicitly denied the defendant's ancillary motions. See *Commonwealth v. Campiti*, 41 Mass. App. Ct. 43, 52 (1996). The decision to allow the defendant's motion for appointment of counsel and motion to amend his motion for new trial lay within the sound discretion of the motion judge. See *Commonwealth v. Conceicao*, 388 Mass. 255, 263-264 (1983) (motion to appoint counsel on a motion for new trial); *Commonwealth v. Pina*, 1 Mass. App. Ct. 853, 854 (1973) (no error for judge to discredit affidavit, and thus deny motion to amend the motion for new trial). We discern no abuse of discretion in the denial of these motions.

5. A judge may rule on a motion for a new trial "on the basis of the facts alleged in the affidavits without further hearing if no substantial issue is raised by the motion or affidavits." Mass. R. Crim. P. 30 (c)(3), 378 Mass. 901 (1979). Ordinarily, appellate courts defer to the discretion of the trial judge on the question of whether or not an evidentiary hearing is required in any particular case. See *Commonwealth v. Licata,* 412 Mass. 654, 660 (1992). For the reasons set forth above, the affidavits and proffered evidence accompanying the defendant's motion did not raise a "substantial issue," and the trial judge did not err in determining that the defendant's motion did not warrant an evidentiary hearing. See *Commonwealth v. DeVincent*, 421 Mass. 64, 68-69 (1995).

6. Finally, as we perceive no error, there can be no cumulative prejudicial effect.

Order affirmed.
By the Court (Armstrong, C.J., Smith & Brown, JJ.),

Ashley Ahern
Clerk
Entered: May 31, 2000

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss

SUPERIOR COURT
CRIMINAL ACTION
NO. 89-5634 THRU
89-5638

COMMONWEALTH
V.
ROGER NORTON

MEMORANDUM

The defendant was convicted of indecent assault and battery on a child under 14. He appealed the conviction and it was affirmed by the Appeals Court on May 14, 1996. 40 Mass. App. Ct. 1121. He has now filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised. Attorney Hammerschmith , who represented the defendant did an excellent job in cross-examining witnesses and developing any inconsistencies. The incident in the defendant's trailer was addressed at trial at some length. The defendant is unhappy at the facts the jury felt were proved. Other matters of "new evidence" were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so.

The Appeals Court specifically dealt with the issue of the search of his wallet and rulings were made on the extent of cross-examination; a requested missing witness instruction and consciousness of guilt evidence.

As trial judge at the time I do not feel that any of the issues raised by the defendant has merit deserving of a new trial.

The defendant got a full fair trial with competent counsel. *Commonwealth v. Curtis*, 417 Mass. 619, 624, 626 (1994); *Commonwealth v. Martinez*, 420 Mass. 622, 624 (1995).

/s/ William H. Welch
William H. Welch
Justice of the Superior Court

Dated: January 12, 1998
/ bmr

(2) Supreme Court, U.S.
FILED
041456 FEB 27 2004

IN THE

Supreme Court of the United States

OCTOBER TERM, 2004

LUIS SPENCER,
Petitioner,

v.

ROGER NORTON,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL APPENDIX

THOMAS F. REILLY
Attorney General of Massachusetts

CATHRYN A. NEAVES*
Assistant Attorney General

DEAN A. MAZZONE
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts, 02108
(617) 727-2200

**Counsel of Record*

TABLE OF CONTENTS

DENIAL OF PETITION FOR REHEARING 2-3

DISTRICT COURT PROVISIONAL ORDER GRANTING PETITION 4

DISTRICT COURT MEMORANDUM ON PROVISIONAL ORDER GRANTING PETITION 5-25

DISTRICT COURT FINAL ORDER GRANTING PETITION ... 26

DISTRICT COURT MEMORANDUM ON FINAL ORDER GRANTING PETITION 27-29

SUPPLEMENTAL APPENDIX

United States Court of Appeals,
For the First Circuit.

No. 03-1571

ROGER NORTON,
Petitioner, Appellee
v.
LUIS SPENCER,
Respondent-Appellant.

Before
Boudin, Chief Judge,
Torruella, Selya, Lynch, Lipez, Howard, Circuit Judges,
and Schwarzer,[1] Senior Circuit Judge.

ORDER OF COURT
Entered: December 2, 2003

The petition for rehearing having been denied by the panel of judges who decided the case, and the petition for rehearing en banc having been submitted to the active judges of this court and a majority of the judges not having voted that the

---

[1] Of the Northern District of California, sitting by designation.

case be heard en banc, it is ordered that the petition for rehearing and petition for rehearing en banc be denied.

This cause is to be remanded to the district court with directions to issue the writ of habeas corpus, unless, within 90 days from the date of this order, the Commonwealth has instituted proceedings to retry the petitioner.

By the Court

By: /s/ Richard C. Donovan
Richard C. Donovan, Clerk

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROGER NORTON, Petitioner	)	
	v.	) CIVIL ACTION NO. 01-30070 -MAP
LUIS S. SPENCER, Respondent	)	

ORDER

March 25, 2003

PONSOR, D.J.

For the reasons stated in the accompanying memorandum, the respondent's Motion to Dismiss (Docket No. 20) is hereby DENIED.

The respondent has until April 11, 2003 to request an evidentiary hearing. If no hearing is requested, the petitioner's Motion for a Writ of Habeas Corpus (Docket No. 1) will be allowed. Upon allowance of the petition, the court will order petitioner released unless, on or before July 11, 2003, the respondent had instituted proceedings to retry the petitioner. Pending such further proceedings, the petitioner shall not be enlarged on bail, unless ordered released by some court having competent jurisdiction.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROGER NORTON, Petitioner	)	
v.	)	CIVIL ACTION NO. 01-30070 -MAP
LUIS S. SPENCER, Respondent	)	

MEMORANDUM REGARDING PETITION FOR WRIT OF HABEAS CORPUS AND RESPONDENT'S MOTION TO DISMISS
(Docket Nos. 1, 20)

March 25, 2003

PONSOR, D.J..

I. INTRODUCTION

Habeas corpus petitioner Roger Norton ("Norton" or "petitioner") argues that he has been wrongly imprisoned following his conviction on four counts of indecent assault and battery on a person under the age of fourteen. His arguments can be divided into two categories: (1) that the prosecution's failure to disclose exculpatory evidence violated his rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963); and (2) that the prosecutions failure to provide a bill of particulars violated his

right to due process. The respondent has moved to dismiss the petition pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254.

As will be seen below, the Commonwealth's apparent failure to provide petitioner crucial exculpatory evidence at his trial clearly violated petitioner's rights as established by *Brady*. Indeed, the apparent concealment of crucial evidence raises serious questions regarding the integrity of the jury verdict. For these reasons, the court will deny respondent's Motion to Dismiss and will allow the petition unless the respondent requests an evidentiary hearing.

II. Factual Background[2]

All the events leading to the petitioner's conviction for indecent assault and battery on a person under the age of fourteen allegedly occurred sometime in 1989. At trial, the petitioner was accused of having, on several occasions, sexually assaulted Hector Fuentes ("Fuentes"), then eleven years old. The assaults were said to have occurred at the home of Fuentes' cousin, Jose Colon ("Colon"), and at a trailer park called Sunledge Campground ("Sunledge").

As the facts emerged at trial, Fuentes and petitioner first met at colon's house, where both were staying as guests, in or

---

[2]According to AEDPA, state court factual findings are "presumed to be correct." 28 U.S.C. § 2254(e)(1). Even where, as here, AEDPA's deferential standard of review is inapplicable, the state courts' factual determinations remain entitled to a presumption of correctness. *See DiBenedetto v. Hall*, 272 F.3d 1, 7 n.1 (1st Cir. 2001); *Campiti v. Matesanz*, 186 F.Supp. 2d 29, 41 (D. Mass. 2002).

around June 1989. During his testimony, Fuentes could not pinpoint the date of this first meeting, although he remembered that it occurred while his mother was in the hospital having a baby.

Fuentes testified that, at some point soon after the two had met, the petitioner approached Fuentes from behind, put his hands on Fuentes' buttocks, picked him up, and said, "This is my boy." (Docket 29, at 3). Fuentes testified further that the petitioner would not put him down despite Fuentes' requests to do so.

The following morning, Fuentes recounted, the petitioner jumped into bed with Fuentes, grabbing Fuentes' genitalia "real hard." Id. Fuentes claimed that he immediately left the bedroom, but did not tell anyone what had happened because he was afraid.

Later that summer, Fuentes and his mother resided in a trailer at Sunledge. At that time, the petitioner was also a Sunledge resident.

Fuentes testified at trial that, on one occasion when he went to the petitioner's trailer to retrieve a kite, the petitioner, who was unclothed, pushed Fuentes onto his bed, touched Fuentes' genitalia, and told Fuentes that he wanted to have sex. Fuentes did not give the petitioner permission to touch him in this manner. He was apparently able to escape Norton without further assault.

At another time that summer, Fuentes testified, the petitioner tackled Fuentes during a game of football. Fuentes testified that, as the two lay on the ground, the petitioner again grabbed and squeezed Fuentes' genitalia.

Fuentes also recounted that, sometime that summer, the petitioner offered Fuentes five dollars to have sex with him and

asked Fuentes to go skinny-dipping with him. Fuentes did not accept either proposition.

The last time he saw the petitioner at Sunledge, Fuentes testified, was after discovering his younger cousin, Noel Rodriguez ("Noel"), crying inside the petitioner's camper. After Fuentes threatened to report the petitioner's conduct to Fuentes' parents, the petitioner reportedly expressed indifference. By the following morning, however, the petitioner had disappeared from the campground.

On or about August 16, 1989, Fuentes made a statement to the state police in which he described these alleged sexual assaults. At the same time, Noel also told police that he was indecently assaulted by petitioner.

The petitioner was arrested sometime within the next month.

III. PROCEDURAL BACKGROUND

On September 14, 1989, a Hampden County grand jury indicted the petitioner on six counts of indecent assault and battery on a child under the age of fourteen, five counts pertaining to the alleged assaults on Fuentes, the sixth pertaining to the alleged assault on Noel. The indictments did not specify the dates of the alleged assaults, only that they occurred prior to August 15, 1989.

Following a pretrial hearing in Massachusetts Superior Court, the trial judge ruled that Noel was not competent to testify at trial. At the hearing, Noel had refused to answer any questions regarding the area of his body where the petitioner had allegedly touched him. Subsequently, the Commonwealth of

Massachusetts ("Commonwealth") chose not to proceed on the indictment pertaining to Noel, but continued to prosecute the other five indictments pertaining to Fuentes.

At some point, the petitioner filed a motion for a bill of particulars in order to narrow the time period for the alleged assaults. The Commonwealth responded that the incidents occurred sometime in 1988 and 1989.

As there were no other eyewitnesses to any of the alleged assaults, Fuentes was the only person to testify to these incidents at trial. Although Fuentes' testimony did not pinpoint dates for the alleged assaults, the prosecutor later confirmed that they likely occurred in the latter half of 1989, around the time when Fuentes' mother was in the hospital having a child.

On or about August 18, 1992, the petitioner was convicted on four counts of indecent assault and battery on a child under the age of fourteen. The trial judge directed a verdict of Not Guilty on the fifth count.

The petitioner was sentenced to the following terms of incarceration in state prison: a term of eight to ten years on indictment number 89-5635; a consecutive term of eight to ten years on indictment number 89-5636; a term of three to five years on indictment 89-5634, concurrent with the sentence imposed for indictment 89-5635; and a term of three to five years on indictment 89-5638, consecutive to the sentence imposed for indictment 89-5636.

On September 28, 1992, the petitioner filed a timely notice of appeal.

On May 14, 1996, the Massachusetts Appeals Court affirmed the conviction in *Commonwealth v. Norton*, 664 N.E.2d

883 (Mass. App. Ct. 1996). On July 9, 1996, the Massachusetts Supreme Judicial Court ("SJC") denied the petitioner's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 667 N.E. 2d 1159 (Mass. 1996).

At some point after 1996 the petitioner made two discoveries that he argued constituted "new evidence" within the meaning of 28 U.S.C. § 2245 (d)(1)(D).

First, the petitioner found the birth certificate of Fuentes' new sibling who was born on June 7, 1989. Upon seeing this birth certificate, various members of the colon household provided affidavits in which they denied that Fuentes had stayed with them during the period surrounding June 7, 1989, as he had stated at trial.

Second, the petitioner asserted that Noel and Noel's mother, Maria Sonia Rodriguez ("Rodriguez"), had told the prosecutor prior to trial that (1) Noel had fabricated his allegations against the petitioner at the insistence of Fuentes, (2) the petitioner had actually done nothing to Noel, and (3) Fuentes had also fabricated his allegations.

Petitioner obtained an affidavit from Noel, in which Noel stated:

> I made up the story against [the petitioner] because my cousin Hector [Fuentes] told me to. Hector told me that he had made up a story about [the petitioner] and Hector told me that I had to say that [the petitioner] had done the same things to me. I was not indecently assaulted by Roger Norton. I made up the story at Hector's insistence.

(Docket 10, Ex. 2).

The petitioner also obtained an affidavit from Rodriguez, which stated, in relevant part:

> During [Fuentes'] childhood, he was a hyperactive child and needed to be medicated to control his hypertension [sic]. I also know that [Fuentes] was a habitual liar and often times . . . stole money from his parents.
>
> Because of [Fuentes'] character traits of lying and stealing, my brother in law and sister Rubin and Maria Colon never allowed [him] to stay at their house without one of his parents being present.
>
> . . .
>
> Noel . . . told me that Roger Norton [petitioner] had not touched him or assaulted him and Noel told me he made up the story against [petitioner] because his cousin Hector Fuentes told him to do it. Noel told me that Hector made up the story about [petitioner] and [Fuentes] told Noel that he had to say that [petitioner] had done the same things to him. Noel has told me that he was not indecently assaulted by Roger Norton and Noel made up the story at [Fuentes'] insistence.

(Docket 10, Ex. 5). Rodriguez added that she saw the Assistant District Attorney Susan Loehn and another person named Rivera "repeatedly tell Noel and [Fuentes] exactly what they had to testify to, even after . . . Noel told them that none of it was true, that [Fuentes] had made it all up." Id.

It is undisputed that the prosecutor never provided the petitioner with the information contained in the Noel and Rodriguez affidavits.

Petitioner brought this evidence before the state court and moved pro se for a new trial on July 9, 1997 before the original trial judge. This motion was denied on January 12, 1998. In rather opaque language, the trial judge made the following findings and rulings:

> The [petitioner] has now filed a motion for a new trial raising the same issues as were raised on the direct appeal or that could have been raised. Attorney Hammersmith, who represented the [petitioner] did an excellent job in cross-examining witnesses and developing any inconsistencies. The incident in the trailer was addressed at trial at some length. The defendant is unhappy at the facts the jury felt were proved. Other matters of "new evidence" were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so.
>
> . . .
>
> As trial judge at the time I do not feel that any of the issues raised by the [defendant] has merit deserving of a new trial. The defendant got a full fair trial with competent counsel.

(Docket 10, Ex. 9).

On May 31, 2000, the Massachusetts Appeals Court affirmed the denial of the petitioner's motion for a new trial in *Commonwealth v. Norton*, 728 N.E.2d 972 (Mass. App. Ct. 2000). The state appellate court addressed the petitioner's allegations of prosecutorial misconduct as follows:

> Next, the [petitioner] argues that several instances of prosecutorial misconduct warrant a

new trial. First, the defendant asserted that the prosecutor committed misconduct by failing to notify defense counsel that she had been informed, prior to trial, that the complainant had admitted he had fabricated the charges against the defendant. In support of this claim, the defendant offered the affidavits of Noel and Maria Rodriguez stating that Maria had informed the prosecutor that the complainant had told Noel that he had "made up" his story about the defendant. The weight and import of these affidavits were for the trial judge's discretion. See *Com. v. DeChristoforo*, 360 Mass. 531, 543. He was not required to accept the statements as true even if they were undisputed. See ibid. Thus, the judge could properly determine that these affidavits did not demonstrate any bad faith on the part of the prosecutor. See *Com. v. Fazio*, 375 Mass. 451, 454 (1976) (bad faith will not be presumed); *Com. v. Errington*, 390 Mass. 875, 883 (1984).

Moreover, the affidavits were not those of trial witnesses who later recanted. Rather they were in Noel's case a statement to the effect that the victim told Noel that "he had made up a story" about the [petitioner], and, in the mother, Maria Rodriguez's case, one further level of hearsay removed from the allegedly recanting victim. In light of the fact that much evidence at the trial was equally calculated to discredit the victim [Fuentes], the judge could properly regard the affidavits as largely cumulative in their basic effect. Undisclosed evidence that is cumulative does not normally require a judge to grant a new

trial. See *Com. v. Tucceri*, 412 Mass. 401, 414 (1992).

(Docket 10, Ex. 6, at 5-6).

On November 1, 2000, the SJC denied the petitioner's application for leave to obtain further appellate review in *Commonwealth v. Norton*, 738 N.E.2d 354 (Mass. 2000).

On April 30, 2001, the petitioner filed this petition for a writ of *habeas corpus*. On March 14, 2002, this court dismissed as time-barred several counts of the petition, which alleged ineffective assistance of counsel, various errors by the trial court, and inadequacies in the indictment. The respondent submitted a final memorandum supporting its motion to dismiss the remaining counts of the petition on November 6, 2002.

IV.DISCUSSION

A. Standard of Review

Enacted by Congress in 1996, AEDPA "placed a new restriction on the power of federal courts to grant writs of habeas corpus to state prisoners." *Williams v. Taylor*, 529 U.S. 362, 399 (2000). In relevant part, AEDPA precludes a federal court from granting habeas relief "to any claim that was adjudicated on the merits in State court," unless the relevant state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d) (1) - (2). Furthermore, AEDPA provides that state-court determinations of factual issues "shall be presumed to be correct" unless the petitioner rebuts the "presumption of

correctness by clear and convincing evidence." 28 U.S.C. § 2254 (e) (1).

In this case, the court must determine whether AEDPA applies when state courts have failed to adjudicate a properly exhausted federal claim. Circuit courts that have spoken on the matter have consistently found that AEDPA does not apply in such circumstances. *See Chadwick v. Janecka*, 312 F.3d 597, 605-07 (3d Cir. 2002); *Norde v. Keane*, 294 F.3d 401, 410 (2d Cir. 2002) ("Because the Appellate Division never indicated in any way that it had considered [petitioner's] Sixth Amendment claims, we find that those claims were not adjudicated on the merits, and therefore that the AEDPA's new, more deferential standard of review does not apply."); *Pirtle v. Morgan*, 313 F.3d 1160, 1167 (9th Cir. 2002) ("Accordingly, . . . we hold that when it is clear that a state court has not reached the merits of a properly raised issue, we must review it de novo."); *Mercadel v. Cain*, 179 F.3d 271, 274-75 (5th Cir. 1999) (per curiam).

Similarly, in *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001), *cert. denied*, 535 U.S. 1018 (2002), the First Circuit made it abundantly clear that a *de novo* standard of review applies to habeas petitions where state courts neglect to address a petitioner's federal claims. *Fortini* itself concerned a defendant who had argued in his appeal to the Massachusetts Appeals Court that the state trial court's decision not to admit disputed evidence violated his constitutional rights under *Chambers v. Mississippi*, 410 U.S. 284 (1973). In affirming the defendant's conviction, the Appeals Court relied exclusively upon Massachusetts evidentiary law, neither addressing the *Chambers* argument nor citing relevant federal authority. Upon review of the defendant's habeas petition, the First Circuit held that a state court must at least *address* a question of federal law for AEDPA to apply.

> Here, the federal claim was never addressed by the state courts. All of the cases that have touched upon this problem (none is directly on point) assume that [AEDPA] applies only when the state court decided the federal issue. After all, AEDPA imposes a requirement of deference to state court decisions, but we can hardly defer to the state court on an issue that the state court did not address.

Fortini, 257 F.3d at 47 (citing 28 U.S.C. § 2254 (d)); *see also Fryar v. Bissonnette*, 318 F.3d 339 (1st Cir. 2003) (citing *Fortini*); *Ellsworth v. Warden, N.H. State Prison*, 318 F.3d 285, 292 (1st Cir. 2003) ("In this Circuit, however, the AEDPA deferential standard of review applies only where the state court actually addressed the merits of the petitioner's federal claim."); *Martinez v. Spencer,* 195 F. Supp. 2d 284, 298 (D. Mass. 2002) (citing *Fortini*).

The facts underlying this case are very similar to those of *Fortini*. Though the petitioner repeatedly asserted in his legal memoranda that the suppression of exculpatory evidence violated his constitutional rights under *Brady v. Maryland*, 373 U.S. 83 (1963), no state court remotely addressed this federal issue. Indeed, the trial court judge did not even discuss the Noel and Rodriguez affidavits. He simply wrote, "Other matters of 'new evidence' were available at the time and could have been introduced or relied on by the defendant if it was in his best interest to do so." (Docket 10, Ex. 9).

The opacity of this language makes it unclear whether the trial judge even knew of the Noel and Rodriguez affidavits. To say that the defense should have availed itself of evidence that was undisputedly *unavailable* is more than puzzling. Indeed, the information contained in the Noel and Rodriguez affidavits was

not of public record, and, absent disclosure by the prosecution, there would have been little reason for defense counsel to interview an alleged victim. The fairest interpretation of the trial judge's reference is that the "new evidence" he mentioned, whatever it was, did not include the affidavits.

The Appeals Court based its ruling on three grounds, none of which directly relates to *Brady*. Applying great deference to the trial judge's ruling, the Appeals Court found that (1) the trial judge could properly determine that the affidavits of Noel and Rodriguez were not credible; (2) the affidavits were likely inadmissable hearsay evidence; and (3) the trial judge could properly determine that the affidavits would be "largely cumulative in their basic effect," since "much evidence at trial was equally calculated to discredit the victim." (Docket 10, Ex. 6, at 5).

None of the Appeals Court's three justifications has any foundation in the trial judge's memo. There is no language in the trial judge's memorandum suggesting that he disbelieved the affidavits, that he found the Noel and Rodriguez affidavits inadmissible hearsay, or that the affidavits, if admitted, would have been cumulative.

Regarding the constitutional claim, only the Appeals Court's unsupported finding that the trial judge might have considered the affidavits to be cumulative conceivably overlaps with the traditional *Brady* inquiry.[2] However, the possibility of overlap is undercut by the absence of language in the trial judge's memorandum suggesting that the affidavits, if admitted, *would*

---

[2]Evidence that is merely cumulative is generally rejected as "material" under *Brady*. *See, e.g., Zeigler v. Callahan*, 659 F.2d 254, 266-67 (1st Cir. 1981).

have been cumulative. As will be seen, the evidence summarized in the affidavits was, in important respects, unique, and certainly far more powerful than any other evidence available to the defense. Based on this, the court must find that the Appeals Court did not adjudicate the petitioner's *Brady* claim on the merits. Under *Fortini*, *de novo* review therefore applies.

At oral argument, the respondent vigorously contended that a recent Supreme Court opinion, *Early v. Packer*, 123 S. Ct. 362 (2002), *reh'g denied*, 123 S. Ct. 955 (2003), implicitly overruled *Fortini*. Thus, AEDPA would apply, according to the respondent, even where the state court *never* addressed the federal issue.

In *Early*, the Supreme Court examined a Ninth Circuit decision that had reversed a federal district court's denial of a habeas petition. The petition concerned a California Supreme Court decision regarding juror coercion that had applied exclusively state law in its analysis, despite federal claims. Nevertheless, in reviewing the habeas petition, the Ninth Circuit summarily assumed that AEDPA's strict standard of review was applicable. *Packer v. Hill*, 277 F.3d 1092, 1100 n. 7 (9th Cir. 2002). The Supreme Court agreed with this portion of the Ninth Circuit's analysis,[3] stating that "[t]he jury-coercion claim in respondent's habeas petition is the same claim rejected on the merits in his direct appeal to the state appellate court." *Early*, 123 S. Ct. at 364.

Even if *Early* may possibly be interpreted to suggest that state courts need only address federal claims in terms of

---

[3]The Supreme Court ultimately disagreed with the Ninth Circuit's finding that the state court decision was contrary to clearly established federal law, and reversed.

analogous state law in order for AEDPA to apply, it would not control this case. No analogous state law whatsoever was addressed here. Moreover, post-*Early* First Circuit decisions have confirmed the continued viability of *Fortini*'s holding. A state court must, in some way, address a petitioner's federal claim before AEDPA's strict standards will control the analysis. Applying *Fortini*, the court finds that the petitioner's *Brady* claim was not adjudicated on the merits, and will therefore review the petition *de novo*.[4]

B. Constitutional Violation: Suppression of Exculpatory Evidence

As noted, the petitioner argues that the prosecution failed in its duties under *Brady v. Maryland*, 373 U.S. 83 (1963), when it withheld exculpatory evidence.

To establish a *Brady* violation, a petitioner must demonstrate that (1) the evidence discovered was material and favorable to the accused; (2) the evidence was suppressed by the state; and (3) the petitioner was prejudiced by the suppression of the evidence and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Strickler v. Greene*, 527 U.S. 263, 281-82 (1999); *United States v. Conley*, 249 F.3d 38, 45 (1st Cir. 2001). This "does not mean that the reviewing court must be certain that a different result would obtain." *United States v. Dumas*, 207 F.3d 11, 15 (1st Cir. 2000) (citing *United States v. Cunan*, 152 F.3d 29, 34 (1st Cir. 1998)). Rather, a petitioner may prove a *Brady* violation by demonstrating that the

---

[4]As will be seen, even if AEDPA did apply to the present case, the court would still allow the petition under its stricter standard.

"favorable evidence could reasonably be taken to put the whole case in such a different light as to undermine the confidence in the verdict." *Kyles v. Whitley*, 514 U.S. 419, 435 (1995).

It is true that evidence inadmissible at trial is immaterial under *Brady*. "Inadmissible evidence is by definition not material, because it never would have reached the jury and therefore could not have affected the trial outcome." *United States v. Ranney*, 719 F.2d 1183, 1190 (1st Cir. 1983); *see also Ellsworth v. Warden, N.H. State Prison*, 318 F.3d 285, 310 (1st Cir. 2003) (Lipez, J., dissenting).

Here, despite the Appeals Court's finding that the affidavits contained hearsay, the portions of the affidavits relevant to the *Brady* claim – Noel's statement to the effect that he initially fabricated the story of sexual assault at the urging of Fuentes and that Fuentes himself confessed to having done the same, and Rodriguez's recount of the district attorney instructing Fuentes to testify in conformity with his August 16, 1989 statement to the police despite Noel's recantation – would certainly have been admissible at trial and undoubtedly offered if counsel had known of them.

To begin with, Noel's statement that he had lied to authorities about Norton's misconduct would be admissible as a statement against interest, since it would "tend[] to subject the declarant [Noel] to . . . criminal liability" pursuant to Fed. R. Evid. 804 (b) (3). The other portions of the Noel and Rodriguez affidavits would be admissible for impeachment purposes. Noel's statement that Fuentes told Noel to make up the story about the petitioner, and that Fuentes himself confessed to having invented the story about the petitioner, would be especially relevant to the issue of Fuentes' credibility.

With respect to Rodriguez's assertion that the assistant district attorney and another person "repeatedly t[old] Noel and

[Fuentes] exactly what they had to testify to, even after . . . Noel told them that none of it was true, that [Fuentes] had made it all up," (Docket 10, Ex. 5), the respondent has not presented any argument that such evidence would be inadmissible at trial, or submitted any affidavit from the assistant district attorney denying this claim. Evidence of this sort of coaching would obviously bear strongly on Fuentes' credibility.

Admissible impeachment evidence is "material" under *Brady*. *See Giglio v. United States*, 405 U.S. 150, 154 (1972). Indeed, in Massachusetts, a new trial based on non-disclosure of impeachment evidence will be warranted, if "the undisclosed evidence is more credible than any other evidence on the same factual issue and bears directly on a crucial issue before the jury, such as the credibility of an important prosecution witness." *Commonwealth v. Tucceri*, 589 N.E.2d 1216, 1224 (Mass. 1992); *see also Zeigler v. Callahan*, 659 F.2d 254, 266-67 (1st Cir. 1981).

Here, the information contained in the Noel and Rodriguez affidavits was not in the public record; absent disclosure by the prosecution, there would have been little opportunity for defense counsel to learn of it. Furthermore, the notion that evidence of a recantation by an alleged victim would merely have been "cumulative" strains credulity. Even if much of the evidence at trial was calculated to discredit the victim, there was simply no direct testimony disputing the account of Fuentes, who was the only witness testifying to the alleged criminal activity. Without directly contradictory testimony, the defense was left with much weaker character and circumstantial evidence to undermine Fuentes' credibility. Indeed, the most disturbing aspect of this case is that the evidence concealed by the Commonwealth (if such concealment occurred) not only would have powerfully compromised the prosecutor's ability to prove the case beyond a reasonable doubt, but raises the clear

possibility that a miscarriage of justice occurred. The affidavits provide affirmative evidence of the petitioner's actual innocence.

For the reasons outlined above, the court finds that the Noel and Rodriguez affidavits are material and favorable to the petitioner, and do satisfy the first prong of the *Brady* inquiry.

The facts of this case easily meet the second prong of the *Brady* inquiry, *i.e.*, a showing of suppression by the prosecution. Recently, the First Circuit found this prong satisfied where a trial court had reviewed and withheld from the defense potentially exculpatory evidence. *See Ellsworth v. Warden, N.H. State Prison*, 318 F.3d 285 (1st Cir. 2003). In this case, the petitioner can make an even stronger argument that the state unlawfully suppressed evidence, since the prosecutor never even discussed Noel's allegations of fraud with the trial judge, much less disclosed such allegations to Norton's counsel.

The final question under *Brady* is whether there is a reasonable likelihood that the outcome of the trial would have been different had the Noel and Rodriguez affidavits been disclosed to the defense. In this case, there is no question that the suppression of this exculpatory evidence "undermines confidence in outcome of the trial." *United States v. Bagley*, 473 U.S. 667, 678 (1985) (Blackmun, J., concurring).

Since Fuentes was the only witness to testify to the alleged criminal activity, the statements of Noel directly contradicting him would have been particularly valuable in undermining Fuentes' credibility. *See, e.g., United States v. Arnold,* 117 F.3d 1308, 1317-18 (11th Cir. 1997) (finding that trial outcome would have been different where tapes not disclosed to defense contained statements contradicting trial testimony of chief government witness); *Johnson v. Nagle*, 58 F. Supp. 2d 1303, 1364 (N.D. Ala. 1999) (finding that disclosure of the

exculpatory information would not likely have resulted in a different outcome, since "information was a surprise to no one, and was in fact consistent with [petitioner's] own story about what happened"), *aff'd*, 256 F.3d 1156 (11th Cir. 2001), *cert. denied*, 535 U.S. 926 (2002). As the First Circuit recently observed on similar facts, "Had the jury been presented with [the impeachment evidence], it seems to us far from clear that it would have reached the same conclusion as to [complainant's] credibility." *Ellsworth*, 318 F.3d at 300.

In sum, reviewing the record *de novo*, the court finds that the prosecution's failure to disclose the information contained in the Noel and Rodriguez affidavits violated the petitioner's constitutional rights under *Brady*.

The court also finds that, even if the AEDPA standard of review were to apply, the prosecutor's failure to disclose exculpatory evidence would necessitate granting the writ of *habeas corpus*.

As outlined above, under AEDPA, a petitioner must show that the relevant state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254 (d) (1)-(2).

In this case, it is hard to know how to approach the analysis under AEDPA because neither the trial judge nor the Massachusetts Appeals Court attempted to weigh the evidence or apply the governing criteria under *Brady*. As noted earlier, when addressing a challenge to the legitimacy of a criminal prosecution based upon a failure to provide exculpatory evidence, courts are obliged to consider whether (1) the evidence discovered is

material and favorable to the accused; (2) the evidence was suppressed by the state; and (3) the petitioner was prejudiced by the suppression of evidence and there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. *See Strickler v. Greene*, 527 U.S. 263, 281-282 (1999).

Whether this case is viewed as an unreasonable application of clearly established federal law - i.e., a holding utterly inconsistent with *Brady* - or an unreasonable determination of the facts in light of the evidence presented in the state court proceedings - i.e., a finding that the affidavits were necessarily incredible or merely cumulative – the result is the same. The claims of the petitioner fully satisfy the AEDPA standard. Therefore, the court finds that, even under AEDPA, the petitioner would be entitled to relief.[5]

---

[5]The failure of the prosecution to supply exact dates for the alleged instances of sexual assault and battery, on the other hand, in no way violated the petitioner's constitutional rights. Young accusers are often unable to give specific details regarding time, place, and circumstances of alleged assaults. *See People v. Jones*, 792 P.2d 643 (Cal. 1990). The SJC addressed this very issue in *Commonwealth v. Kirkpatrick*, 668 N.E.2d 790, 794 (Mass. 1996), *cert. denied*, 519 U.S. 1015 (1996), finding that the defendant was not unfairly prejudiced where he did not contend "that his defense would have been different had the victim been able to be more precise about the dates and times of the assaults." *Id.* In this case, the petitioner has never contended that his defense would have been different had the Commonwealth provided precise dates of the alleged assaults.

V. CONCLUSION

Based on the foregoing, the petitioner is entitled, at a minimum, to a hearing at which the court can make findings of fact regarding his allegations that the prosecutor failed to provide exculpatory evidence. Given that the Noel and Rodriguez affidavits are so far entirely unrebutted, the court will issue the petition without an evidentiary hearing, unless the respondent requests one. Counsel for respondent declined to take a position on this point at oral argument.

Unless the respondent requests an evidentiary hearing by April 11, 2003, the court will allow the petition. The court at that time will order petitioner released unless, on or before July 11, 2003, the respondent has instituted proceedings to retry the petitioner. Pending such further proceedings, the petitioner shall not be enlarged on bail, unless ordered released by some court having competent jurisdiction.

A separate order will issue.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROGER NORTON, Petitioner	)	
	v.	) CIVIL ACTION NO. 01-30070- -MAP
LUIS S. SPENCER, Respondent	)	

ORDER

April 16, 2003

PONSOR, D.J.

For the reasons stated in the accompanying memorandum, Respondent's Motion for Reconsideration (Docket No. 35) is hereby DENIED. Based upon this and upon the absence of any request for an evidentiary hearing by the respondent, the petitioner's Motion for Writ of Habeas Corpus (Docket No. 1) is hereby ALLOWED. The petitioner is ordered released unless, on or before July 11, 2003, the Commonwealth has instituted proceedings to retry the petitioner. Pending such further proceedings, the petitioner shall not be enlarged on bail, unless ordered released by some court having competent jurisdiction. The clerk will enter judgment for petitioner. This file may now be closed.

It is So Ordered.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

ROGER NORTON, Petitioner	)	
	v.	) CIVIL ACTION NO. 01-30070 -MAP
LUIS S. SPENCER, Respondent	)	

MEMORANDUM REGARDING RESPONDENT'S MOTION FOR RECONSIDERATION AND PETITIONER'S MOTION FOR WRIT OF HABEAS CORPUS

(Docket Nos. 35, 1)

April 16, 2003

PONSOR, D.J.

Petitioner Roger Norton has sought *habeas* relief from this court, based (among other things) upon the prosecution's failure to disclose exculpatory evidence at his trial, in violation of his rights as set forth in *Brady v. Maryland*, 373 U.S. 83 (1963). The respondent moved to dismiss the petition pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), 28 U.S.C. § 2254.

On March 25, 2003, the court issued its memorandum denying the Motion to Dismiss and indicating that it would allow the petition unless the respondent requested an evidentiary hearing by April 11, 2003. In this memorandum, the court found that AEDPA did not apply, since deference was not due to the

state court when the state court did not address the federal issue. *Fortini v. Murphy*, 257 F.3d 39, 47 (1st Cir. 2001). The court also found that the petitioner had made an unrebutted showing of a substantial *Brady* violation. The unrebutted record established that, at the petitioner's state court trial, the prosecutor had deliberately concealed evidence that was not only highly exculpatory, but actually cast doubt upon the factual guilt of the petitioner.

On April 8, 2003, the respondent filed a Motion for Reconsideration of Order Concerning Election of Evidentiary Hearing (Docket No. 35). The respondent's motion provides further evidence in support of the axiom that no good deed goes unpunished.

The purpose of providing an opportunity for the respondent to request an evidentiary hearing was to bend over backwards to be sure that the respondent had every opportunity to defend against the petitioner's request for relief. In composing its memorandum, the court made it absolutely clear that the petitioner *had* made a showing sufficient, not merely to justify an evidentiary hearing, but sufficient to mandate immediate relief. The petitioner's factual representations were supported by unrebutted affidavits. Significantly, the Commonwealth has never at any point denied the existence of the exculpatory evidence, the prosecutor's knowledge of the exculpatory evidence, the prosecutor's deliberate decision to withhold disclosure of the exculpatory evidence, or the truth of the exculpatory evidence.

In order to be sure that the respondent was not so focused on his legal arguments that he inadvertently overlooked an opportunity to present opposing factual material, the court afforded the respondent an opportunity to put this factual information on the record before allowing the petition. This was,

emphatically, *not* a situation where the court shifted the burden to the respondent. On the contrary, and at the risk of repetition, the court found that the petitioner *had* fully carried his burden of showing not just an entitlement to an evidentiary hearing, but an entitlement to full substantive relief. To insure no confusion, and no possible prejudice to the respondent, the court gave respondent an opportunity to request an evidentiary hearing, if he desired one, before allowing the petition for writ of *habeas corpus* and ordering petitioner's release. This extra consideration to the respondent should not be distorted, in some way, into a suggestion that the *petitioner's* submissions were in any way inadequate. To repeat, petitioner more than carried his burden here.

Based upon the petitioner's failure to request an evidentiary hearing, and in accordance with the Court's order of March 25, 2003, the petitioner's Motion for Writ of Habeas Corpus (Docket No. 1) is hereby ALLOWED. The Motion for Reconsideration is DENIED. The respondent is ordered to release the petitioner unless, on or before July 11, 2003, the Commonwealth has instituted proceedings to retry the petitioner.

A separate Order will issue.

/s/ Michael A. Ponsor
MICHAEL A. PONSOR
U.S. District Judge

(3)

No. 03-1456

in the

Supreme Court of the United States

LUIS SPENCER,

Petitioner

v.

ROGER NORTON,

Respondent

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the First Circuit

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

Stewart T. Graham, Jr.
Graham & Graham
39 Burleigh Road
Hampden, MA 01036
(413) 781-4342

Attorney for Respondent
Roger Norton

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

CONSTITUTIONAL PROVISIONS 1

STATUTORY PROVISIONS 1

REASONS FOR DENYING THE WRIT 2

THE COURT OF APPEALS DECISION DOES NOT CONFLICT WITH ANY DECISION OF THIS COURT AND IS CONSISTENT WITH THE GOVERNING STATUTE. THEREFORE THE PETITION DOES NOT PRESENT AN IMPORTANT ISSUE OF FEDERAL LAW OR ANY GROUNDS FOR ISSUANCE OF THE WRIT

ARGUMENT 2

I SINCE THE COURT OF APPEALS CORRECTLY APPLIED BOTH THE STATUTE AND THIS COURT'S DECISIONS CONSTRUING THE STATUTE, THE PETITION PRESENTS NO BASIS FOR A WRIT OF CERTIORARI 2

II. SINCE THE STATE COURT MADE NO RULING ON THE ADMISSIBILITY OF THE INFORMATION IN THE AFFIDAVITS, THE COURT OF APPEALS DECISION DID NOT AND COULD NOT CONFLICT WITH ANY RULING BY THE STATE COURT 8

CONCLUSION 12

APPENDIX

AFFIDAVIT OF NOEL RODRIGUEZ ..... App. 1

AFFIDAVIT OF MARIA RODRIGUEZ ..... App. 3

TABLE OF AUTHORITIES

FEDERAL CASES

Alcorta v. Texas, 355 U.S. 28 (1957) 10

Brady v. Maryland, 373 U.S. 83 (1963) 3, 7, 10

Banks v. Dretke, ___ U.S. ___, 2004; 124 S.Ct. 1256 (2004) 10

Chambers v. Mississippi, 410 U.S. 284 (1973) 9

Crane v. Kentucky, 476 U.S. 683 (1986) 9

Davis v. Alaska, 415 U.S. 308 (1974) 10

Delaware v. Van Arsdall, 475 U.S. 673 (1986) 10

Giglio v. United States, 405 U.S. 150 (1972) 10

Giles v. Maryland, 386 U.S. 66 (1967) 10

Kyles v. Whitley, 514 U.S. 419 (1995) 10

LaVallee v. Delle Rose, 410 U.S. 690 (1973) 3, 5, 6

Marshall v. Lonberger, 459 U.S. 422 (1983) 3, 4, 5, 6, 7 9

Mooney v. Holohan, 294 U.S. 103 (1935) 10

Parker v. Dugger, 498 U.S. 591 (1982) 7

Puleio v. Vose, 830 F.2d 1197 (1st Cir. 1987) 9

Stickler v. Greene, 527 U.S. 263 (1999) 10

United States v. Agurs, 427 U.S. 97 (1976) 10

United States v. Bagley, 473 U.S. 667 (1985) 10

STATE CASES

Commonwealth v. Basch, 386 Mass. 620 (1982) 8

Commonwealth v. Daye, 393 Mass. 55 (1984) 8

CONSTITUTIONAL PROVISIONS

Fourteenth Amendment 10, 11

Sixth Amendment 10, 11

STATUTES

28 U.S.C. §2254 (d) (1) 5, 11, 12

28 U.S.C. §2254 (d) (2) 2, 7, 12

TEXT OF CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment Six

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

United States Constitution, Amendment Fourteen

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

TEXT OF STATUTORY PROVISIONS INVOLVED

28 U.S.C. §2254 (d)

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated n the merits in State court proceedings unless the adjudication of the claim-

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

REASONS FOR DENYING THE WRIT

The Petition in this case fails to present any conflict between the decision of the Court of Appeals and any decision of this Court. It will be shown below that the decision of the Court of Appeals is entirely consistent with the relevant decisions of this Court and is faithful to the provisions of the governing statute: 28 U.S.C. §2254 (d) (2). The case presents no substantial federal question, implicates none of the considerations set forth in Supreme Court Rule 10, and the case is of interest only to the parties. This is not a case in which the Writ should be granted.

POINT I

SINCE THE COURT OF APPEALS CORRECTLY APPLIED BOTH THE STATUTE AND THIS COURT'S DECISIONS CONSTRUING THE STATUTE, THE PETITION PRESENTS NO BASIS FOR A WRIT OF CERTIORARI

The first issue that the Respondent Spencer presents misstates the opinion of the Court of Appeals. Spencer states the issue as follows:

> Did the First Circuit err in holding that, when a state court summarily denies a *habeas* petitioner's motion for a new trial, which includes a *Brady v. Maryland* claim premised on affidavits, the state court should be deemed not to have ruled on the credibility of the affidavit.

(Pet. Cert. at i). The Court of Appeals made no such holding. What that court held was that "[w]e are unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). Thus, the Court of Appeals based its decision on the record and the facts of the case, and simply found no record or factual support for any inference

of an implicit credibility determination. *Id.* The Court of Appeals did not *deem* anything; it made a record-based decision.

This issue arose in the context of Mr. Norton's motion for a new trial in the state trial court. The motion contained several grounds; however, only the allegation of a *Brady* violation is relevant for purposes of the instant Petition. Mr. Norton argued that the prosecutor withheld exculpatory evidence that Noel Rodriguez, one of tow complaining witness against him, recanted his allegations prior to trial, and told the prosecutor that the remaining complainant, Hector Fuentes, told him he, too, had fabricated his allegations against Mr. Norton. Noel Roadriguez provided an affidavit in support of Norton's motion. (Resp. App. at 1) Noel's mother, Maria Rodriguez provided an affidavit as well. (Resp. App. at 3) Mrs. Rodriguez recounted in her affidavit her son's recanting of his allegations to the prosecutor and his telling the prosecutor about Fuentes' statement. *Id.* She also described her observations of the prosecutor's improper coaching of her son and Fuentes in preparation for trial. *Id.*

The trial court denied the motion and the appeals court affirmed. (Pet. App. at 14 and 24). The trial court made no factual findings and did not mention the affidavits. *Id.* at 24-25. It apparently treated the information in the affidavits as evidence that could have been presented at trial or on direct appeal. (Pet. App. at 2; and 24-25). Spencer argues that the mere denial of the new trial motion, without more, requires a finding that an adverse credibility determination must be implied. (Pet. Cert. at 7-12). Apparently, he believes that *Marshall v. Lonberger,* 459 U.S. 422 (1983) and *LaVallee v. Delle Rose*, 410 U.S. 690 (1973), compel this conclusion. *Id.* Mr. Norton will show below, that Spencer misreads *Marshall* and *LaVallee*, and that the Court of Appeals correctly applied the decisions of this Court.

The point that the Respondent Spencer has failed to grasp throughout this case, is that in order to draw an inference, there must be facts that would support drawing that inference. Both the District Court (Pet. Supp. App. at 16-18), and the Court of Appeals (Pet. App. at 9), expressly found there were no such facts. Neither court rejected the principle of *Marshall v. Lonberger, supra*, that where there are facts supporting an implicit credibility finding by a state court, then a court reviewing an *habeas* petition cannot substitute its judgement for that implicit finding. The Court of Appeals ruled that it was "unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). That is, there were no facts from which to infer that the trial court made any credibility determination, implicit or otherwise. Thus, contrary to the Respondent's formulation of the Question Presented, the Court of Appeals did not hold that when a motion for new trial based on affidavits is denied, "the state court should be *deemed* not to have ruled on the credibility of the affidavits." (Pet. Cert. at i; emphasis supplied). The Court of Appeals held, correctly, that where there is no factual basis for an inference that the state court ruled on the credibility of affidavits, no inference that it did so can be drawn. (Pet. App. at 9).

The Court of Appeals, following the District Court, noted that in deciding the new trial motion, (1) the trial court held no hearing; (2) the trial court made no findings of fact; (3) there was no evidence impugning the credibility of the affiants; and, finally, (4) the record "suggests that the trial court did not evaluate the affidavits, much less that the trial court implicitly found the affidavits to be incredible." (App. at 9-10). The Court of Appeals properly distinguished *Marshall v. Lonberger, supra*, on the grounds that the record in *Marshall* revealed that the trial court had (1) held a lengthy hearing including testimony

by the defendant; (2) there was documentary evidence supporting the inference to be drawn; (3) the trial court could not have made the decision it made, had it believed the defendant. Id. at 432-436.

The issue in *Marshall, supra,* was whether the defendant's prior conviction could be introduced into evidence to prove a specification in an indictment on subsequent charges. The defendant testified at a pre-trial hearing that he had not been advised of the all charges in the prior indictment, specifically, one charge of attempted murder, when he plead guilty to it. *Id.* at 432-433. The indictment clearly contained the charge, the certificate of conviction completed at the time of the plea stated that the defendant was advised of the consequences of his plea, his attorney acknowledge the legal and factual sufficiency of the indictment, and the defendant affirmatively responded to the charge of "attempt on Dorothy Maxwell with a knife ... ." *Id.* at 435-436. Following the hearing, the court, at trial admitted the conviction into evidence. *Id.* at 434. The Court noted that had the trial court believed the defendant, then it could not have allowed the conviction to have been used at trial. *Id.* Thus, in *Maxwell*, the trial court's decision logically subsumed the credibility determination.

In *Lavallee v. Delle Rose*, *supra*, the issue before the Court was whether a federal *habeas* court erred when it conducted a hearing to determine whether confessions introduced in the petitioner's trial were voluntary. A state court had previously held an evidentiary hearing on the same issue and found the confessions to be voluntary. *Id.* at 693-694. The federal courts held that since the state court did not articulate its findings on the petitioner's credibility, *i.e.* whether his account of the interrogation and confessions was accurate, there was no state court ruling on the subject as required by the version of 28 U.S.C. §2254 (d) (1) then in place. This Court reversed, holding that there was no

evidence the state court applied the wrong legal standards, and indeed, the evidence was that the correct standards were applied. *Id.* at 695.

In *LaVallee*, there was a full hearing and the petitioner testified, setting forth the facts as he contended they were. This Court concluded that

> ... we quite agree with the District Court's statement that it could not go along with the state trial court's conclusion of voluntariness if it "were to find the facts to have been as petitioner's [Delle Rose's] testimony portrayed them." (Citations omitted). Under these circumstances, we think the District Court could have been reasonably certain that the state court would have granted relief if it had believed respondent's allegations.

Thus, the rationale of *LaVallee* is precisely the same as in *Marshall v. Lonberger, supra*, that where the decision of a state court, after a hearing, logically subsumes the issue of credibility, a federal *habeas* court should honor that implicit determination.

In contrast, in the instant case, the Court of Appeals correctly read the record as revealing that "there is no indication that the trial court ever viewed or evaluated the affidavits." (Pet. App. at 8). The trial judge held no hearing, there were no documents bearing on the credibility of the affidavits, and he made no ruling which could be found implicitly to have made any such evaluation. (Pet. App. 9-10).. Rather, the trial judge treated the information contained in the affidavits as having been available at the time of trial. The Court of Appeals noted that the trial judge stated in his order that Mr. Norton "... filed a motion for new trial raising the same issues as were raised on the direct appeal or that could have been raised." (App. at 9). A determination by the trial court, if made, that the affidavits did not amount to "new evidence," does not import any credibility determination. The trial judge could have made his decision without passing on the credibility of the affidavits. Thus, the trial court's decision did not subsume within it the issue of credibility. That was the meaning of the Court of Appeals holding that it was

"unwilling to infer that the trial judge viewed the affiants as incredible when there is nothing in the record, or in the circumstances of this case, to support such an inference." (Pet. App. at 9). Moreover, the trial court's statement that the evidence, indisputably unavailable at the time of trial, was not new, was itself indisputably unreasonable and thus was not accorded any deference as provided by 28 U.S.C. §2254 (d) (2). (Pet. App. at 9). Spencer does not contest this holding.[1]

The state appeals court in the instant case, stated that the trial judge "... was not required to accept the [affidavits] as true ... ." (Pet. App. at 10 and 17). It was unclear whether that was a factual reconstruction of the trial court's decision. However, as noted above, there was no record support for a finding that the trial judge made any such decision. (Pet. App. at 9-10). Since the record did not support the state appeals court's reconstruction, if that is what it was, the Court of Appeals correctly declined to accord it any deference. *Id.* at 11; *see, Parker v. Dugger,* 498 U.S. 591, 597 (1982). On the facts established by the record, the Court of Appeals properly concluded that any finding by the state appeals court that a credibility determination was made by the trial court, would be an unreasonable determination of the facts. (Pet. App. 9-10). 28 U.S.C. §2254 (d) (2).

Thus, the Court of Appeals correctly applied 28 U.S.C. §2254 (d) (2), and all relevant decisions of this Court, including *Marshall v. Lonberger, supra.* Spencer does not contest the constitutional propriety of those decisions. Therefore, Spencer has failed to demonstrate that there is any substantial federal question presented in its Petition, or that there is any conflict between the Court of Appeals decision in this case and any decision of this Court. Spencer's Petition for Writ of Certiorari should be denied.

---

[1] The Petitioner Spencer does not contest the Court of Appeals and the District Court's findings that the information in the affidavits was not cumulative, but was newly discovered exculpatory evidence.

POINT II

SINCE THE STATE COURT MADE NO RULING ON THE ADMISSIBILITY OF THE INFORMATION IN THE AFFIDAVITS, THE COURT OF APPEALS DECISION DID NOT AND COULD NOT CONFLICT ANY RULING BY THE STATE COURT

Spencer, styles his second Question Presented, as follows:

> Did the first circuit err in holding that *habeas* relief can be granted on the basis of a *Brady v. Maryland* claim premised on affidavits when the state court of appeals has held that the affidavits would, under state law, have been inadmissible at trial in state court?

(Pet. Cert. at i).

First, it is clear that the Court of Appeals made no such holding. (Pet. App. at 12-13, nt. 8). The court explicitly stated that "[t]he state courts never directly addressed whether the material in Noel's or [Ms.]Rodriguez' affidavits was admissible." *Id.* The court went on to note that the Massachusetts Appeals Court characterized Ms. Rodriguez' affidavit as "'one further level of hearsay removed from the allegedly recanting victim,' implying that both affidavits were inadmissible hearsay." *Id.* The Court of Appeals determined, however, that such an implication was not necessary. *Id.*

The fact that Noel Rodriguez' (the recanting complainant) recounting of what Fuentes (the complainant at trial) told him was hearsay, does not make it inadmissible. Hearsay is admissible for a number of reasons, as the Court of Appeals noted. *Id.* Fuentes' statements were admissible as prior inconsistent statements for impeachment purposes. *Id.*, citing *Commonwealth v. Daye*, 393 Mass. 55, 469 N.E. 2d 483 (1984); *accord*, *Commonwealth v. Basch*, 386 Mass. 620 (1982) (judge has no discretion to exclude impeachment through prior inconsistent statement on a material matter). Thus, while the state appeals court may have characterized Noel's affidavit as hearsay, that was not a

ruling as to admissibility. Pursuant to Massachusetts' evidence law, Fuentes' statements to Noel were admissible to impeach Fuentes, despite the fact that they were hearsay. *Id.* Therefore, the Court of Appeals did not "overrule" any evidentiary holding by the state appeals court.

The Massachusetts Appeals Court characterization of Ms. Rodriguez' affidavit as "one further level of hearsay" focussed on that portion of Ms. Rodriguez' affidavit that repeated what Noel had told her about Fuentes. (Pet. App. at 17-18; and 12-13, nt. 8). Ms. Rodriguez' statements as to what her son told her may well have been inadmissible. However, the Court of Appeals correctly ruled that her personal observations of the prosecutor's improperly coaching the witnesses would have been admissible. *Id.* The Massachusetts Appeals Court did not address that portion of Ms. Rodriguez' affidavit. (Pet. App. at 17-18). Thus, the Court of Appeals did not, and could not "overrule" the state court's evidentiary ruling as Spencer asserts. (Pet.Cert. at 13). Spencer's citation to *Puleio v. Vose*, 830 F.2d 1197 (1st Cir. 1987), is inapt. *Puleio* held that a federal court is bound by a state court's interpretation of its evidentiary law. *Id* at 1204. However, in the present case, there was no interpretation of Massachusetts' evidentiary law involved, and the Court of Appeals' decision was entirely in accord with, and cited to Massachusetts law. (Pet. App. at 12-13, nt. 8).

Typically, a reviewing court in a *habeas* proceeding does not review evidentiary errors or state evidentiary rules, *see, Marshall v. Lonberger, supra*. However, when an evidentiary rule or ruling subverts a constitutional right or would render the defendant's trial fundamentally unfair a court is empowered to review such matters. *Chambers v. Mississippi*, 410 U.S. 284 (1973); *Crane v. Kentucky*, 476 U.S. 683 (1986). It cannot be gainsaid that the refusal to admit evidence to impeach the state's only witness to alleged

criminal acts would render a trial fundamentally unfair. *See, Banks v. Dretke*, __ U.S. __, 124 S.Ct. 1256 (2004); *Stickler v. Greene*, 527 U.S. 263 (1999); *Kyles v. Whitley*, 514 U.S. 419 (1995); *United States v. Bagley*, 473 U.S. 667, 676 (1985); *Giglio v. United States*, 405 U.S. 150 (1972); *United States v. Agurs*, 427 U.S. 97 (1976); *Giles v. Maryland*, 386 U.S. 66 (1967); *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); *Mooney v. Holohan*, 294 U.S. 103, 110-112 (1935). In each of the above cases, this Court ruled that withholding evidence which could have been used to impeach a key government witness violated the defendant's Fifth and Fourteenth Amendment due process rights. In *United States v. Giglio, supra*, at 153-154, this Court held that

> [t]he principle that a State may not knowingly use false evidence, including false testimony, to obtain a tainted conviction, implicit in any concept of ordered liberty, does not cease to apply merely because the false testimony goes only to the credibility of the witness. The jury's estimate of the truthfulness and reliability of a given witness may well be determinative of guilt or innocence, and it is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend. When the 'reliability of a given witness may well be determinative of guilt or innocence,' nondisclosure of evidence affecting credibility falls within this general rule.

The right to cross-examine and to impeach a key government witness also implicates Sixth Amendment concerns. *Davis v. Alaska,* 415 U.S. 308 (1974). This Court stated in *Delaware v. Van Arsdall*, 475 U.S. 673, 680 (1986), that

> [w]e think that a criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby "to expose to the jury the facts from which jurors ... could appropriately draw inferences relating to the reliability of the witness." *Davis v. Alaska, supra*, at 318.

Therefore, even if the state courts had determined that the critical impeachment evidence (that Fuentes, the remaining complaining witness, had stated that he had fabricated his charges against Mr. Norton) was inadmissible hearsay, the Court of Appeals would have

been empowered by the Constitution and relevant decisions of this Court to reject that determination.

In the present case, the Court of Appeals correctly applied the pertinent decisions of this Court regarding withholding of exculpatory evidence, and ruled that the information in the affidavits was material for *Brady* purposes. (Pet. App. at 12). The court ruled that "[s]uch information is evidence that is clearly favorable to the accused and would have substantially undermined his judgement of guilt if it had been presented at Norton's trial." *Id.* at 12. The court concluded: "... there is a reasonable probability that, had the evidence been disclosed to the defense, the outcome could have been different." *Id.* at 13. Again, the Respondent Spencer has not contested this ruling.

Spencer protests in his Petition for *Certiorari* that the court of appeals improperly based its *Brady* analysis on the "flawed premise that the information in the affidavits was true." (Pet. Cert. at 8 and nt. 1). Spencer miscomprehends the proceedings. The district court ruled that Mr. Norton had met his burden, not just for a hearing, but for *habeas* relief based on the unrebutted character of the affidavits. (Pet. Supp. App. at 28-29). The court had earlier found that, on the record in this case, the affidavits could not be considered as necessarily incredible. *Id.* at 24. Therefore, the court gave Spencer the opportunity to have an evidentiary hearing at which witness could be examined and the prosecutor given the opportunity to rebut the allegations if she could. That offer was rejected. (Pet. Supp. App. at 27-29). Thus, the affidavits stand unrebutted in the record and Spencer's protest is ungrounded.

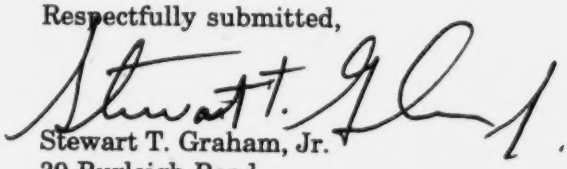
The Court of Appeals would have been justified by 28 U.S.C. §2254 (d) (1), in holding that a state evidentiary ruling excluding material, impeachment evidence would have denied Mr. Norton a fair trial in violation of his right to due process as guaranteed by

the Fifth and Fourteenth Amendments, and would have violated his Sixth Amendment right to confrontation of witnesses. However, since the state appeals court made no ruling regarding admissibility, as demonstrated above, this issue is essentially moot.

CONCLUSION

Mr. Norton prays this Court deny the Petition for Certiorari since it presents no substantial federal question, no conflict between the decision of the Court of Appeals for the First Circuit in this case and the decisions of this Court, and the Court of Appeals decision is entirely consistent with the governing statute, 28 U.S.C. §2254, *et seq.*

Respectfully submitted,



Stewart T. Graham, Jr.
39 Burleigh Road
Hampden, MA 01036
(413) 781-4342

Attorney for Respondent
Roger Norton

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
NOS. 89-5634 through
89-5638

COMMONWEALTH

v.

ROGER NORTON

AFFIDAVIT OF NOEL RODRIGUEZ
IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL

I, Noel Rodriguez, do hereby swear and attest that the following facts are true to the best of my knowledge and belief:

1. I make this affidavit in support of Roger Norton's Motion for a New Trial.

2. I reside with my mother and sister at 51 Orchard Street, Springfield, Massachusetts.

3. I am Hector Fuentes' cousin.

4. I have read that portion of Hector Fuentes' testimony at Roger Norton's trial as it relates to me. I specifically identify Hector's testimony, as it appears in the trial transcript, vol. II, dated August 17, 1989, page 20, lines 13 - 20, as being false. I was never in Roger's camper crying nor did Hector ever come into Roger's camper to get me.

5. I was contacted by the Massachusetts State Police in August 1989 and questioning by the State Police led to a criminal complaint being filed against Roger Norton for Indecent Assault & Battery on me. I made up the story against Roger because my cousin Hector told me to. Hector told me that he had made up a story about Roger and Hector told me that I had to say that Roger had done the same things to me. I was

not indecently assaulted by Roger Norton. I made up the story at Hector's insistence.

6. I am willing to testify to the above matter in court under oath.

Signed and sworn to under the pains and penalties of perjury this 30th day of July, 1997 at Springfield, Massachusetts and in the presence of my mother, Maria Sonia Rodriguez.

MARIA SONIA RODRIGUEZ
SS# 030-56-7687

NOEL RODRIGUEZ
SS# 032-62-9271

Subscribed and sworn to this 30th day of July, 1997, before me.

NOTARY PUBLIC

My commission expires: 8-26-99.

COMMONWEALTH OF MASSACHUSETTS

HAMPDEN, ss.

SUPERIOR COURT
NOS. 89-5634 through
89-5638

COMMONWEALTH

v.

ROGER NORTON

AFFIDAVIT OF MARIA SONIA RODRIGUEZ
IN SUPPORT OF DEFENDANT'S MOTION FOR A NEW TRIAL

I, Maria Sonia Rodriguez, do hereby swear and attest that the following facts are true to the best of my knowledge and belief:

1. I make this affidavit in support of Roger Norton's Motion for a New Trial.

2. I am the mother of Noel Rodriguez who was a complainant against Roger in August, 1989. I reside with my son Noel and my daughter at 51 Orchard Street, Springfield, Massachusetts.

3. My brother, Alfredo Fuentes, is Hector Fuentes' father.

4. My sister in law, Sandra Fuentes, gave birth to her son James at Bay State Hospital on June 7, 1989. Sandra had the baby by cesarean section. Sandra was in the hospital for three days and while Sandra was in the hospital, Hector was cared for by his father, Alfredo Fuentes.

5. Maria Colon is my sister. Hector Fuentes did not stay at the Colon's house when Sandra was in the hospital giving birth to her son James.

6. Hector did not stay with me while his mother was in the hospital giving birth to her son James. While Sandra was in the hospital, Hector was cared for by his father, Alfredo Fuentes. Alfredo and Sandra also have an older daughter Marisely Fuentes and Alfredo cared for both Hector and Marisely while his wife was in the hospital.

7. During Hector's childhood, he was a hyperactive child and needed to be medicated to control his hypertension. I also know that Hector was a habitual liar and often times Hector stole money from his parents.

8. Because of Hector's character traits of lying and stealing, my brother in law and sister Rubin and Maria Colon never allowed Hector to stay at their house without one of his parents being present.

9. During the spring and summer of 1989, my sister Maria Colon and my brother Alfredo Fuentes each maintained a trailer at the Sunledge Campgrounds in Granville, Massachusetts. On weekends, I visited my sister Maria at the Sunledge Campgrounds and stayed in her trailer from Friday night to Sunday. While at the Sunledge Campgrounds, my son Noel and Hector Fuentes were always playing together.

10. After my sister in law gave birth to her son James, she returned to her home in Springfield after leaving the hospital. Sandra later brought her son James to the Sunledge Campgrounds but only stayed a short while because of the bad weather. When Sandra left the campgrounds, Hector also left with her and returned to their home in Springfield.

11. My son, Noel was contacted by the Massachusetts State Police in August, 1989 and questioning by the State Police led to a criminal complaint being filed against Roger for Indecent Assault & Battery on Noel Rodriguez. Noel later told me that Roger Norton had not touched him or assaulted him and Noel told me he made up the story against Roger because his cousin Hector Fuentes told him to do it. Noel told me that Hector made up the story about Roger and Hector told Noel that he had to say that Roger had done the same things to him. Noel has told me that he was not indecently assaulted by Roger Norton and Noel made up the story at Hector's insistence.

11. I was present with my son Noel during the trial of Roger Norton during the summer of 1992. At this time, I told the Assistant District Attorney Susan Loehn that my son Noel had told me that the statement he made to the State Police was not true and that he made up the

accusations because Hector told him to do so. I was also present at the courthouse while Susan Loehn and a First Name Unknown Rivera were preparing Noel and Hector for their testimony at trial. Assistant District Attorney Susan Loehn read the statements previously obtained by the State Police to Noel and Hector and Assistant District Attorney Loehn told both boys they had to tell the Judge and Jury exactly what was written down by the state police when their statements were recorded. I observed both Loehn and Rivera repeatedly tell Noel and Hector exactly what they had to testify to, even after my son Noel told them that none of it was true, that Hector had made it all up.

12. I was not able to testify at trial concerning these specific dates because the dates of the alleged offenses were not known by me when I testified. I told Assistant District Attorney Susan Loehn that my son Noel had made up the story about Roger but I did not tell Roger's attorney this information at the time of trial.

8. I am willing to testify to the above matter in court under oath.

Signed and sworn to under the pains and penalties of perjury this 3rd day of ~~June~~ July, 1997 at Springfield, Massachusetts.

Maria Sonia Rodriguez
MARIA SONIA RODRIGUEZ
030-56-4689

Subscribed and sworn to, this 3rd day of ~~June~~ July, 1997, before me.

M.S.R.

NOTARY PUBLIC

My commission expires: 8-26-99.

(4)

Supreme Court, U.S.
FILED
MAY 18 2004
OFFICE OF THE CLERK

No. 03-1456

IN THE SUPREME COURT OF THE UNITED STATES

LUIS SPENCER,
Petitioner

v.

ROGER NORTON,
Respondent

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Comes now the Respondent Roger Norton, and moves this Court for leave to proceed in this Court *in forma pauperis* on the Petitioner Spencer's Petition for *Certiorari*. The Respondent Norton is an inmate at the Massachusetts Correctional Institution at Gardner, Massachusetts. Respondent was represented by appointed counsel at trial and on direct appeal. He proceeded *pro se* in his new trial motion. The Respondent's family assisted him by paying the fees and costs associated with the federal court proceedings below but can no longer do so. The Petitioner is indigent and cannot afford the fees and costs associated with this proceeding. The Respondent's affidavit of indigency and inmate transaction report are attached.

WHEREFORE, the Petitioners move this Court for leave to proceed *in forma pauperis* in this Court.

Respectfully submitted,

May 14, 2004

Stewart T. Graham, Jr.
Graham & Graham
39 Burleigh Road
Hampden, MA 01036
(413) 781-4342

Attorney for Respondent
Roger Norton

AFFIDAVIT OR DECLARATION
IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

I, ROGER NORTON, am the petitioner in the above-entitled case. In support of my motion to proceed *in forma pauperis*, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

1. For both you and your spouse estimate the average amount of money received from each of the following sources during the past 12 months. Adjust any amount that was received weekly, biweekly, quarterly, semiannually, or annually to show the monthly rate. Use gross amounts, that is, amounts before any deductions for taxes or otherwise.

Income source	**Average monthly amount during the past 12 months**		**Amount expected next month**	
	You	Spouse	You	Spouse
Employment	$ 0	$ 0	$ 0	$ 0
Self-employment	$ 0	$ 0	$ 0	$ 0
Income from real property (such as rental income)	$ 0	$ 0	$ 0	$ 0
Interest and dividends	$ 0	$ 0	$ 0	$ 0
Gifts	$ 0	$ 0	$ 0	$ 0
Alimony	$ 0	$ 0	$ 0	$ 0
Child Support	$ 0	$ 0	$ 0	$ 0
Retirement (such as social security, pensions, annuities, insurance)	$ 0	$ 0	$ 0	$ 0
Disability (such as social security, insurance payments)	$ 0	$ 0	$ 0	$ 0
Unemployment payments	$ 0	$ 0	$ 0	$ 0
Public-assistance (such as welfare)	$ 0	$ 0	$ 0	$ 0
Other (specify):	$ 0	$ 0	$ 0	$ 0
Total monthly income:	$ 0	$ 0	$ 0	$ 0

2. List your employment history for the past two years, most recent first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
NONE			$ 0
			$
			$

3. List your spouse's employment history for the past two years, most recent employer first. (Gross monthly pay is before taxes or other deductions.)

Employer	Address	Dates of Employment	Gross monthly pay
N/A			$
			$
			$

4. How much cash do you and your spouse have? $ 0
Below, state any money you or your spouse have in bank accounts or in any other financial institution.

Financial institution	Type of account	Amount you have	Amount your spouse has
N/A	NONE	$ 0	$ N/A
		$	$
		$	$

5. List the assets, and their values, which you own or your spouse owns. Do not list clothing and ordinary household furnishings.

☐ Home
Value 0

☐ Other real estate
Value 0

☐ Motor Vehicle #1
Year, make & model 0
Value 0

☐ Motor Vehicle #2
Year, make & model 0
Value 0

☐ Other assets
Description NONE
Value 0

6. State every person, business, or organization owing you or your spouse money, and the amount owed.

Person owing you or your spouse money	Amount owed to you	Amount owed to your spouse
NONE	$ 0	$
	$	$
	$	$

7. State the persons who rely on you or your spouse for support.

Name	Relationship	Age
NONE		

8. Estimate the average monthly expenses of you and your family. Show separately the amounts paid by your spouse. Adjust any payments that are made weekly, biweekly, quarterly, or annually to show the monthly rate.

	You	Your spouse
Rent or home-mortgage payment (include lot rented for mobile home) Are real estate taxes included? ☐ Yes ☐ No Is property insurance included? ☐ Yes ☐ No	$ 0	$
Utilities (electricity, heating fuel, water, sewer, and telephone)	$ 0	$
Home maintenance (repairs and upkeep)	$ 0	$
Food	$ 0	$
Clothing	$ 0	$
Laundry and dry-cleaning	$ 0	$
Medical and dental expenses	$ 0	$

	You	Your spouse
Transportation (not including motor vehicle payments)	$ 0	$
Recreation, entertainment, newspapers, magazines, etc.	$ 0	$
Insurance (not deducted from wages or included in mortgage payments)		
Homeowner's or renter's	$ 0	$
Life	$ 0	$
Health	$ 0	$
Motor Vehicle	$ 0	$
Other: NONE	$ 0	$
Taxes (not deducted from wages or included in mortgage payments)		
(specify): NONE	$ 0	$
Installment payments	0	
Motor Vehicle	$ 0	$
Credit card(s)	$ 0	$
Department store(s)	$ 0	$
Other: NONE	$ 0	$
Alimony, maintenance, and support paid to others	$ 0	$
Regular expenses for operation of business, profession, or farm (attach detailed statement)	$ 0	$
Other (specify): NONE	$ 0	$
Total monthly expenses:	$ 0	$

9. Do you expect any major changes to your monthly income or expenses or in your assets or liabilities during the next 12 months?

☐ Yes ☒ No If yes, describe on an attached sheet.

10. Have you paid – or will you be paying – an attorney any money for services in connection with this case, including the completion of this form? ☐ Yes ☒ No

If yes, how much? _____

If yes, state the attorney's name, address, and telephone number:

11. Have you paid—or will you be paying—anyone other than an attorney (such as a paralegal or a typist) any money for services in connection with this case, including the completion of this form?

☐ Yes ☒ No

If yes, how much? _____

If yes, state the person's name, address, and telephone number:

12. Provide any other information that will help explain why you cannot pay the costs of this case.

I am presently incarcerated at North Central Correctional facility in Gardner, Massachusetts. The Massachusetts Department of Correction has denied prison employment because of the status of my case.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 9, , 2004

(Signature)

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
Inmate Transaction Report

Date : 20040309 14:14

Commit# : W53208 — **NCCI GARDNER** — **Page :** 1

Name : NORTON, ROGER, B, — **Statement From** 20030101

Inst : NCCI GARDNER — **To** 20040309

Block : THOMPSON-3

Cell/Bed : 355 /B

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal Income	Personal Expense	Savings Income	Savings Expense
					Total Transaction before this Period :	**$624.76**	**$485.80**	**$119.16**	**$9.00**
20030102 09:55	IS - Interest	625625		GAR		$0.38	$0.00	$0.00	$0.00
20030102 09:55	IS - Interest	625626		GAR		$0.00	$0.00	$0.27	$0.00
20030106 09:40	IC - Transfer from Inmate to Club A/c	639737		GAR	~HAIR CUT~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030108 23:12	CN - Canteen	656894		GAR	~Canteen Date : 20030108	$0.00	$25.38	$0.00	$0.00
20030115 08:52	IS - Interest	677577		GAR		$0.28	$0.00	$0.00	$0.00
20030115 08:52	IS - Interest	677578		GAR		$0.00	$0.00	$0.27	$0.00
20030116 22:30	CN - Canteen	696195		GAR	~Canteen Date : 20030116	$0.00	$23.43	$0.00	$0.00
20030121 22:30	CN - Canteen	704626		GAR	~Canteen Date : 20030121	$0.00	$18.35	$0.00	$0.00
20030124 14:29	ML - Mail	720732	905	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030129 22:30	CN - Canteen	729453		GAR	~Canteen Date : 20030129	$0.00	$15.30	$0.00	$0.00
20030205 22:30	CN - Canteen	751538		GAR	~Canteen Date : 20030205	$0.00	$31.30	$0.00	$0.00
20030206 15:29	IC - Transfer from Inmate to Club A/c	760665		GAR	~HAIR CUT 2/6/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030211 08:49	IS - Interest	776147		GAR		$0.29	$0.00	$0.00	$0.00
20030211 08:49	IS - Interest	776148		GAR		$0.00	$0.00	$0.26	$0.00
20030212 22:30	CN - Canteen	789948		GAR	~Canteen Date : 20030212	$0.00	$40.82	$0.00	$0.00
20030219 22:30	CN - Canteen	807018		GAR	~Canteen Date : 20030219	$0.00	$16.96	$0.00	$0.00
20030224 15:08	ML - Mail	824205	914	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030226 22:30	CN - Canteen	831408		GAR	~Canteen Date : 20030226	$0.00	$30.67	$0.00	$0.00
20030305 22:30	CN - Canteen	853977		GAR	~Canteen Date : 20030305	$0.00	$30.47	$0.00	$0.00
20030312 22:30	CN - Canteen	875877		GAR	~Canteen Date : 20030312	$0.00	$37.22	$0.00	$0.00
20030314 10:37	IC - Transfer from Inmate to Club A/c	887308		GAR	~HAIR CUT 3/14/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030318 07:46	IS - Interest	899853		GAR		$0.24	$0.00	$0.00	$0.00
20030318 07:46	IS - Interest	899854		GAR		$0.00	$0.00	$0.23	$0.00
20030318 10:29	ML - Mail	908405	920	GAR	~SMITH, ELAINE, ,	$150.00	$0.00	$0.00	$0.00
20030319 22:30	CN - Canteen	913445		GAR	~Canteen Date : 20030319	$0.00	$21.69	$0.00	$0.00
20030326 22:30	CN - Canteen	935423		GAR	~Canteen Date : 20030326	$0.00	$28.62	$0.00	$0.00
20030402 13:19	CI - Transfer from Club to Inmate A/c	955382		GAR	~3/25/03 Canteen Refund Lin~W53208 NORTON,ROGER B PERSONAL~KCN WASH ACCOUNT - Z5	$1.05	$0.00	$0.00	$0.00
20030402 22:30	CN - Canteen	956782		GAR	~Canteen Date : 20030402	$0.00	$31.57	$0.00	$0.00

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
Inmate Transaction Report

Date : 20040309 14:14

Commit# : W53208

Name : NORTON, ROGER, B.

Inst : NCCI GARDNER

Block : THOMPSON-3

Cell/Bed : 355 /B

NCCI GARDNER

Statement From 20030101

To 20040309

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
20030408 10:05	IS - Interest	982222		GAR		$0.23	$0.00	$0.00	$0.00
20030408 10:05	IS - Interest	982223		GAR		$0.00	$0.00	$0.18	$0.00
20030409 22:30	CN - Canteen	995327		GAR	~Canteen Date : 20030409	$0.00	$11.68	$0.00	$0.00
20030411 15:04	IC - Transfer from Inmate to Club A/c	1007524		GAR	~MAIL~POSTAGE - Z11~POSTAGE - Z11	$0.00	$3.95	$0.00	$0.00
20030411 15:27	IC - Transfer from Inmate to Club A/c	1007612		GAR	~POSTAGE ~POSTAGE - Z11~POSTAGE - Z11	$0.00	$5.63	$0.00	$0.00
20030416 22:30	CN - Canteen	1017484		GAR	~Canteen Date : 20030416	$0.00	$16.42	$0.00	$0.00
20030423 22:30	CN - Canteen	1037564		GAR	~Canteen Date : 20030423	$0.00	$26.80	$0.00	$0.00
20030425 14:35	IC - Transfer from Inmate to Club A/c	1050185		GAR	~HAIR CUT 4/25/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030425 14:35	AT - Account Transfer	1050184		GAR	~HAIR CUT 4/25/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20030430 22:30	CN - Canteen	1060133		GAR	~Canteen Date : 20030430	$0.00	$39.52	$0.00	$0.00
20030505 10:53	ML - Mail	1074972	937	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030507 22:30	CN - Canteen	1083475		GAR	~Canteen Date : 20030507	$0.00	$22.89	$0.00	$0.00
20030509 09:20	IS - Interest	1102497		GAR		$0.15	$0.00	$0.00	$0.00
20030509 09:20	IS - Interest	1102498		GAR		$0.00	$0.00	$0.16	$0.00
20030514 22:30	CN - Canteen	1122740		GAR	~Canteen Date : 20030514	$0.00	$12.50	$0.00	$0.00
20030521 22:30	CN - Canteen	1145238		GAR	~Canteen Date : 20030521	$0.00	$33.52	$0.00	$0.00
20030528 22:30	CN - Canteen	1167738		GAR	~Canteen Date : 20030528	$0.00	$25.66	$0.00	$0.00
20030529 09:27	ML - Mail	1176168	946	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030529 10:24	AT - Account Transfer	1176589		GAR	~HAIR CUT 5/23/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20030529 10:25	IC - Transfer from Inmate to Club A/c	1176590		GAR	~HAIR CUT 5/23/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030604 22:30	CN - Canteen	1193315		GAR	~Canteen Date : 20030604	$0.00	$29.69	$0.00	$0.00
20030610 16:23	IS - Interest	1230568		GAR		$0.13	$0.00	$0.00	$0.00
20030610 16:23	IS - Interest	1230569		GAR		$0.00	$0.00	$0.16	$0.00
20030611 22:30	CN - Canteen	1243931		GAR	~Canteen Date : 20030611	$0.00	$40.95	$0.00	$0.00
20030618 22:31	CN - Canteen	1273916		GAR	~Canteen Date : 20030618	$0.00	$31.55	$0.00	$0.00
20030623 11:21	IC - Transfer from Inmate to Club A/c	1292192		GAR	~Appliance Order~CANTEEN CORP. WASH ACCOUNT - Z6~CANTEEN CORP. WASH ACCOUNT - Z6	$0.00	$9.22	$0.00	$0.00
20030625 22:30	CN - Canteen	1302940		GAR	~Canteen Date : 20030625	$0.00	$22.07	$0.00	$0.00
20030626 10:02	ML - Mail	1313088	951	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030626 13:08	AT - Account Transfer	1313605		GAR	~HAIR CUT 6/27/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
Inmate Transaction Report

Date : 20040309 14:14

Commit# : W53208

Name : NORTON, ROGER, B,

Inst : NCCI GARDNER

Block : THOMPSON-3

Cell/Bed : 355 /B

NCCI GARDNER

Statement From 20030101

To 20040309

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
20030626 13:09	IC - Transfer from Inmate to Club A/c	1313610		GAR	~HAIR CUT 6/27/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030702 22:30	CN - Canteen	1332605		GAR	~Canteen Date : 20030702	$0.00	$3.13	$0.00	$0.00
20030709 16:12	IS - Interest	1364314		GAR		$0.10	$0.00	$0.00	$0.00
20030709 16:12	IS - Interest	1364315		GAR		$0.00	$0.00	$0.14	$0.00
20030709 22:30	CN - Canteen	1374375		GAR	~Canteen Date : 20030709	$0.00	$33.16	$0.00	$0.00
20030716 22:30	CN - Canteen	1403352		GAR	~Canteen Date : 20030716	$0.00	$37.76	$0.00	$0.00
20030721 11:05	ML - Mail	1421871	958	GAR	~SMITH, ELAINE, ,	$150.00	$0.00	$0.00	$0.00
20030723 22:30	CN - Canteen	1432760		GAR	~Canteen Date : 20030723	$0.00	$28.74	$0.00	$0.00
20030730 22:30	CN - Canteen	1460821		GAR	~Canteen Date : 20030730	$0.00	$22.39	$0.00	$0.00
20030806 22:30	CN - Canteen	1489151		GAR	~Canteen Date : 20030806	$0.00	$24.88	$0.00	$0.00
20030807 15:31	IS - Interest	1507041		GAR		$0.12	$0.00	$0.00	$0.00
20030807 15:31	IS - Interest	1507042		GAR		$0.00	$0.00	$0.13	$0.00
20030811 11:10	IC - Transfer from Inmate to Club A/c	1523256		GAR	~Clothing/Footwear Purchase~KCN WASH ACCOUNT - Z5~KCN WASH ACCOUNT - Z5	$0.00	$66.98	$0.00	$0.00
20030813 22:30	CN - Canteen	1535655		GAR	~Canteen Date : 20030813	$0.00	$17.53	$0.00	$0.00
20030818 13:09	IC - Transfer from Inmate to Club A/c	1551888		GAR	~POSTAGE - Z11~POSTAGE - Z11	$0.00	$3.96	$0.00	$0.00
20030820 22:30	CN - Canteen	1561085		GAR	~Canteen Date : 20030820	$0.00	$14.39	$0.00	$0.00
20030822 09:04	IC - Transfer from Inmate to Club A/c	1577287		GAR	~HAIR CUT 8/1/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030822 09:04	AT - Account Transfer	1577286		GAR	~HAIR CUT 8/1/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20030826 10:58	ML - Mail	1584744	965	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20030903 22:30	CN - Canteen	1614251		GAR	~Canteen Date : 20030903	$0.00	$0.56	$0.00	$0.00
20030910 07:55	IS - Interest	1650118		GAR		$0.07	$0.00	$0.00	$0.00
20030910 07:55	IS - Interest	1650119		GAR		$0.00	$0.00	$0.13	$0.00
20030910 08:38	IC - Transfer from Inmate to Club A/c	1659088		GAR	~HAIR CUT 9/5/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20030910 08:38	AT - Account Transfer	1659084		GAR	~HAIR CUT 9/5/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20030910 22:30	CN - Canteen	1663310		GAR	~Canteen Date : 20030910	$0.00	$49.84	$0.00	$0.00
20030917 22:30	CN - Canteen	1691138		GAR	~Canteen Date : 20030917	$0.00	$21.21	$0.00	$0.00
20030923 22:30	CN - Canteen	1717207		GAR	~Canteen Date : 20030923	$0.00	$9.82	$0.00	$0.00
20030929 10:25	ML - Mail	1738314	976	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20031001 22:30	CN - Canteen	1749881		GAR	~Canteen Date : 20031001	$0.00	$18.07	$0.00	$0.00

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
Inmate Transaction Report

Date : 20040309 14:14

Commit# : W53208

Name : NORTON, ROGER, B,

Inst : NCCI GARDNER

Block : THOMPSON-3

Cell/Bed : 353 /B

NCCI GARDNER

Statement From 20030101

To 20040309

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
20031007 22:30	CN - Canteen	1775577		GAR	~Canteen Date : 20031007	$0.00	$1.18	$0.00	$0.00
20031008 16:58	IS - Interest	1785423		GAR		$0.07	$0.00	$0.00	$0.00
20031008 16:58	IS - Interest	1785424		GAR		$0.00	$0.00	$0.12	$0.00
20031010 15:29	IC - Transfer from Inmate to Club A/c	1809994		GAR	~HAIR CUT 10/10/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20031010 15:29	AT - Account Transfer	1809993		GAR	~HAIR CUT 10/10/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20031015 22:30	CN - Canteen	1822442		GAR	~Canteen Date : 20031015	$0.00	$43.48	$0.00	$0.00
20031016 14:20	IC - Transfer from Inmate to Club A/c	1832718		GAR	~MAIL ~POSTAGE - Z11~POSTAGE - Z11	$0.00	$1.98	$0.00	$0.00
20031016 14:20	IC - Transfer from Inmate to Club A/c	1832720		GAR	~MAIL ~POSTAGE - Z11~POSTAGE - Z11	$0.00	$5.30	$0.00	$0.00
20031022 22:30	CN - Canteen	1850196		GAR	~Canteen Date : 20031022	$0.00	$23.22	$0.00	$0.00
20031024 15:22	CI - Transfer from Club to Inmate A/c	1866258		GAR	~Canteen refund 10/14/03~W53208 NORTON,ROGER B PERSONAL~KCN WASH ACCOUNT - Z5	$1.05	$0.00	$0.00	$0.00
20031028 22:30	CN - Canteen	1875645		GAR	~Canteen Date : 20031028	$0.00	$17.95	$0.00	$0.00
20031103 11:29	ML - Mail	1896964	984	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20031107 16:27	IS - Interest	1930397		GAR		$0.08	$0.00	$0.00	$0.00
20031107 16:27	IS - Interest	1930398		GAR		$0.00	$0.00	$0.13	$0.00
20031112 22:30	CN - Canteen	1951423		GAR	~Canteen Date : 20031112	$0.00	$9.01	$0.00	$0.00
20031117 15:34	IC - Transfer from Inmate to Club A/c	1971214		GAR	~HAIR CUT 11/14/03~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20031117 15:34	AT - Account Transfer	1971213		GAR	~HAIR CUT 11/14/03~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20031118 22:30	CN - Canteen	1976028		GAR	~Canteen Date : 20031118	$0.00	$32.74	$0.00	$0.00
20031124 22:30	CN - Canteen	2001379		GAR	~Canteen Date : 20031124	$0.00	$35.18	$0.00	$0.00
20031201 13:03	ML - Mail	2026755	991	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20031203 22:31	CN - Canteen	2038279		GAR	~Canteen Date : 20031203	$0.00	$31.81	$0.00	$0.00
20031209 13:41	IS - Interest	2066520		GAR		$0.09	$0.00	$0.00	$0.00
20031209 13:41	IS - Interest	2066521		GAR		$0.00	$0.00	$0.13	$0.00
20031217 22:30	CN - Canteen	2114231		GAR	~Canteen Date : 20031217	$0.00	$58.29	$0.00	$0.00
20031223 11:28	ML - Mail	2141944	1012	GAR	~SMITH, ELAINE, ,	$200.00	$0.00	$0.00	$0.00
20031223 22:31	CN - Canteen	2146346		GAR	~Canteen Date : 20031223	$0.00	$30.04	$0.00	$0.00
20031231 13:37	AT - Account Transfer	2175061		GAR	~HAIR CUT~W53208 NORTON,ROGER B PERSONAL	$1.50	$0.00	$0.00	$1.50
20031231 13:38	IC - Transfer from Inmate to Club A/c	2175062		GAR	~HAIR CUT~HAIRCUT REVENUE - Z3~HAIRCUT REVENUE - Z3	$0.00	$1.50	$0.00	$0.00
20031231 22:30	CN - Canteen	2176943		GAR	~Canteen Date : 20031231	$0.00	$9.07	$0.00	$0.00

COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF CORRECTION
Inmate Transaction Report

Date : 20040309 14:14

Commit# : W33208

Name : NORTON, ROGER, B,

Inst : NCCI GARDNER

Block : THOMPSON-3

Cell/Bed : 355 /B

NCCI GARDNER

Statement From 20030101

To 20040309

Transaction Date	Type	Receipt #	Check No	Inst Name	Notes	Personal		Savings	
						Income	Expense	Income	Expense
20040102 09:56	IC - Transfer from Inmate to Club A/c	2186248		GAR	~APPLIANCE ORDER~CANTEEN CORP. WASH ACCOUNT - Z6~CANTEEN CORP. WASH ACCOUNT - Z6	$0.00	$15.36	$0.00	$0.00
20040107 22:30	CN - Canteen	2205698		GAR	~Canteen Date : 20040107	$0.00	$61.54	$0.00	$0.00
20040113 12:05	IS - Interest	2233915		GAR		$0.16	$0.00	$0.00	$0.00
20040113 12:05	IS - Interest	2233916		GAR		$0.00	$0.00	$0.13	$0.00
20040114 22:30	CN - Canteen	2250192		GAR	~Canteen Date : 20040114	$0.00	$25.62	$0.00	$0.00
20040116 08:42	IC - Transfer from Inmate to Club A/c	2263042		GAR	~CLOTHING PURCHASE 1/16/04~KCN WASH ACCOUNT - Z5~KCN WASH ACCOUNT - Z5	$0.00	$6.50	$0.00	$0.00
20040120 22:31	CN - Canteen	2274461		GAR	~Canteen Date : 20040120	$0.00	$28.31	$0.00	$0.00
20040123 12:16	ML - Mail	2291679	1024	GAR		$100.00	$0.00	$0.00	$0.00
20040127 22:30	CN - Canteen	2302045		GAR	~Canteen Date : 20040127	$0.00	$44.66	$0.00	$0.00
20040203 22:30	CN - Canteen	2329041		GAR	~Canteen Date : 20040203	$0.00	$18.76	$0.00	$0.00
20040205 14:47	IC - Transfer from Inmate to Club A/c	2343620		GAR	~MAIL ~POSTAGE - Z11~POSTAGE - Z11	$0.00	$1.98	$0.00	$0.00
20040210 11:40	IS - Interest	2363434		GAR		$0.17	$0.00	$0.00	$0.00
20040210 11:40	IS - Interest	2363435		GAR		$0.00	$0.00	$0.13	$0.00
20040211 22:31	CN - Canteen	2379530		GAR	~Canteen Date : 20040211	$0.00	$41.82	$0.00	$0.00
20040217 22:30	CN - Canteen	2400853		GAR	~Canteen Date : 20040217	$0.00	$19.54	$0.00	$0.00
20040225 22:30	CN - Canteen	2435048		GAR	~Canteen Date : 20040225	$0.00	$25.26	$0.00	$0.00
20040301 12:15	ML - Mail	2453622	1036	GAR	~SMITH, ELAINE, ,	$100.00	$0.00	$0.00	$0.00
20040301 15:16	IC - Transfer from Inmate to Club A/c	2454379		GAR	~AMERICAN VETERANS IN PRISON - Z25~AMERICAN VETERANS IN PRISON - Z25	$0.00	$10.00	$0.00	$0.00
20040303 22:30	CN - Canteen	2465992		GAR	~Canteen Date : 20040303	$0.00	$4.20	$0.00	$0.00
						$1,616.66	$1,655.55	$2.57	$12.00

	Personal	Savings
Balance as of ending date :	$168.87	$160.73

Current Balances :

Personal	Savings	Freeze	Loan	Restitution	Sentence
$100.07	$100.73	$0.00	$0.00	$0.00	$0.00